Volume 5, No. 11, Pages 3134 to 3336, May 21 - June 1, 1990.

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

Andrew C. Barrett

Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: **5 FCC Rcd 1 (1990)**

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

JUL 16 1990

Depository Document

Federal Communications Commission Record

Volume 5
Issue 11

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 3134

Federal Communications Commission Record

Table of Cases
Volume 5
Issue 11

Case Name	Page
AT&T of Puerto Rico, Inc.	3240
AT&T of Puerto Rico, Inc.	3270
Alabama Public Safety Plan	3304
Aldridge, Joe L.	3218
Amendment of Part 1 - Broadcast Licensing	3252
Amendment of Part 32 - Uniform System of Accounts	3209
Amendment of Part 80 - Passenger Vessels	3264
Amendment of Part 90 - Emergency Medical Radio Service	3305
Amendment of Section 22.922 - Assignments of Applications	3265
American Cellular Services U.S.	3236
American Pioneer Telephone of Texas, Inc.	3230
American Telephone and Telegraph Company	3271
American Telephone and Telegraph Company	3272
Aspen FM, Inc.	3196
Automatic Transmitter Identification System	3256
Bankston, Dimitri	3295
Beach Broadcasting Limited Partnership	3201
Bonne Broadcasting, Inc.	3279
Butte Broadcasting Company, Inc.	3281
Carmody's Radio Paging Service, Inc.	3321
Century III Orlando, Florida, Inc.	3150
Cincinnati Bell Telephone Company's Cost Allocation Manual	3205
Dorothy O. Schulze and Deborah Brigham	3227
FM Radio Partners Limited Partnership	3210
FTC Communications, Inc.	3323
FTC Communications, Inc.	3328
Facsimile Marketing, Inc.	3299
Fine Arts Radio, Inc.	3275
Firestone, Esq. Charles M.	3255
Five Star Broadcasting, Inc.	3263
Fog Communications	3297
Fox Broadcasting Company	3211
GTE Hawaiian Telephone Company, Inc.	3269
Hughes-Moore Associates, Inc.	3277
Illinois Consolidated Telephone Company	3246
Individual Case Basis Rates for DS3 Services	3331
Inlet Broadcasting Company	3192
International Telecom Access, Inc.	3241
Jireh's Broadcasting, Limited Partnership	3308

Case Name	Page
Josephine Broadcasting Limited Partnership	3162
Kill Devil Hills Communications Limited Partnership	3140
La Star Cellular Telephone Company	3286
Lindsay Broadcasting	3188
Local Exchange Carriers - Revisions to Tariffs	3248
McClenahan Broadcasting, Inc.	3170
Micronesian Telecommunications, Corp.	3242
Mobile Telecommunication Technologies Corporation	3251
Network Services, Inc.	3134
Northwest Network Communications, Inc.	3302
Partridge, Jana R.	3138
Paul Ondulich v. AT&T Communications, Inc.	3190
Puerto Rico Communications Authority	3161
RC Communication, Inc.	3165
RKO General, Inc. (KFRC)	3222
Ram Communications of Michigan, Inc.	3235
Rebecca Radio of Marco	3208
Richardson Independent School District	3135
Rochester Telephone Mobile Communications	3233
Rogersville Radio Broadcasting	3282
Rucker Radio	3293
Saltaire Communications, Inc.	3260
Schultz, Pepper	3273
Sierra Cellular Partners	3207
Sorenson, Ronald	3144
TBJ Broadcasting Partnership	3284
TRT International, Inc.	3300
Table of Allotments, FM, Corinth, Hadley and Queensbury, NY	3243
Table of Allotments, FM, Elizabethton, TN	3319
Table of Allotments, FM, Hannibal, OH	3315
Table of Allotments, FM, Heidelberg, MS	3320
Table of Allotments, FM, McComb, MS and Kentwood, LA	3311
Table of Allotments, FM, Southampton and Bridgehampton, NY	3313
Table of Allotments, FM, Woodward, OK	3317
The Ameritech Operating Companies	3231
The Tellesis Partners	3206
WMRI, Inc.	3306

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 5
Issue 11

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 90 - 497	3140	DA 90 - 743	3235
DA 90 - 587	3165	DA 90 - 744	3264
DA 90 - 597	3260	DA 90 - 745	3231
DA 90 - 607	3275	DA 90 - 746	3233
DA 90 - 608	3138	DA 90 - 747	3323
DA 90 - 609	3293	DA 90 - 748	3328
DA 90 - 610	3162	DA 90 - 749	3304
DA 90 - 611	3188	DA 90 - 750	3269
DA 90 - 649	3279	DA 90 - 759	3270
DA 90 - 650	3306	DA 90 - 761	3319
DA 90 - 651	3277	DA 90 - 762	3320
DA 90 - 652	3263	DA 90 - 763	3311
DA 90 - 670	3295	DA 90 - 764	3313
DA 90 - 671	3308	DA 90 - 766	3315
DA 90 - 675	3281	DA 90 - 767	3317
DA 90 - 677	3282	DA 90 - 768	3299
DA 90 - 678	3297	DA 90 - 770	3300
DA 90 - 679	3284	DA 90 - 771	3305
DA 90 - 697	3134	DA 90 - 773	3302
DA 90 - 702	3246	DA 90 - 776	3321
DA 90 - 703	3248	FCC 90 - 150	3256
DA 90 - 704	3251	FCC 90 - 179	3135
DA 90 - 711	3255	FCC 90 - 180	3222
DA 90 - 712	3150	FCC 90 - 185	3243
DA 90 - 713	3161	FCC 90 - 186	3211
DA 90 - 719	3205	FCC 90 - 187	3286
DA 90 - 720	3190	FCC 90 - 188	3265
DA 90 - 731	3209	FCC 90 - 195	3252
DA 90 - 732	3206	FCC 90 - 197	3227
DA 90 - 733	3207	FCC 90 - 200	3273
DA 90 - 734	3271	FCC 90D - 24	3170
DA 90 - 735	3272	FCC 90D - 25	3201
DA 90 - 736	3331	FCC 90D - 26	3218
DA 90 - 738	3236	FCC 90R - 34	3144
DA 90 - 739	3230	FCC 90R - 35	3192
DA 90 - 740	3240	FCC 90R - 36	3208
DA 90 - 741	3241	FCC 90R - 37	3196
DA 90 - 742	3242	FCC 90R - 39	3210

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 5
Issue 11

Docket Number	Page
CC Dkt.No.88 - 136	3331
CC Dkt.No.90 - 215	3209
CC Dkt.No.90 - 257	3286
CC Dkt.No.90 - 258	3265
GEN Dkt.No.86 - 337	3256
GEN Dkt.No.90 - 280	3304
MM Dkt.No.83 - 1206	3273
MM Dkt.No.84 - 1098	3222
MM Dkt.No.85- - 269	3227
MM Dkt.No.86 - 331	3243
MM Dkt.No.87 - 244	3208
MM Dkt.No.87 - 424	3196
MM Dkt.No.88 - 238	3144
MM Dkt.No.88 - 296	3192
MM Dkt.No.88 - 440	3170
MM Dkt.No.89 - 66	3201
MM Dkt.No.89 - 112	3218
MM Dkt.No.89 - 123	3210
MM Dkt.No.89 - 405	3319
MM Dkt.No.89 - 471	3320
MM Dkt.No.90 - 190	3140
MM Dkt.No.90 - 218	3165
MM Dkt.No.90 - 226	3260
MM Dkt.No.90 - 229	3138
MM Dkt.No.90 - 230	3162
MM Dkt.No.90 - 235	3188
MM Dkt.No.90 - 236	3293
MM Dkt.No.90 - 237	3275
MM Dkt.No.90 - 244	3277
MM Dkt.No.90 - 245	3306
MM Dkt.No.90 - 247	3279
MM Dkt.No.90 - 248	3263
MM Dkt.No.90 - 250	3308
MM Dkt.No.90 - 252	3295
MM Dkt.No.90 - 253	3297
MM Dkt.No.90 - 265	3284
MM Dkt.No.90 - 266	3281
MM Dkt.No.90 - 267	3282
MM Dkt.No.90 - 282	3311
MM Dkt.No.90 - 283	3313
MM Dkt.No.90 - 285	3315
MM Dkt.No.90 - 286	3317
PR Dkt.No.90 - 134	3264

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 5
Issue 11

Rulemaking Number	Page
RM - 5471	3243
RM - 5614	3243
RM - 6697	3320
RM - 6818	3319
RM - 7169	3311
RM - 7222	3313
RM - 7235	3315
RM - 7285	3317
RM - 7313	3313
RM - 7336	3305

Federal Communications Commission Record

Table of Cases by City
Volume 5
Issue 11

City/State	Page	City/State	Page
Albuquerque, NM	3210	Lindsay, CA	3188
Aspen, CO	3196	London, KY	3277
Blanco, TX	3227	Long Beach, MS	3201
Bremen, IN	3306	Los Angeles, CA	3255
Bridgehampton, NY	3313	Marco, FL	3208
Charlottesville, VA	3170	McComb, MS	3311
Corinth, NY	3243	Meridian, MS	3138
Dallas, TX	3135	Murrells Inlet, SC	3192
Des Moines, IA	3144	New Baltimore, MI	3235
Elizabethton, TN	3319	New Orleans, LA	3286
Erie, PA	3162	Orland, CA	3281
Fishkill, NY	3321	Orlando, FL	3150
Fort Rucker, AL	3293	Pawcatuck, CT	3260
Guilford, CT	3275	Pocomoke City, MD	3263
Hadley, NY	3243	Queensbury, NY	3243
Hannibal, OH	3315	Rochester, NY	3233
Hawesville, KY	3218	Rogersville, AL	3282
Heidelberg, MS	3320	San Francisco, CA	3222
Jacksonville, NC	3308	Santa Barbara, CA	3165
Kentwood, LA	3311	South Oroville, CA	3297
Kill Devil Hills, NC	3140	Southampton, NY	3313
Larose, LA	3279	Sparks, NV	3273
Lima, OH	3295	Walterboro, SC	3284
		Woodward, OK	3317

Subject Index
Volume 5
Issue 11

Subject	Page
Adjudication	
Air hazard	3218
Civic participation	3170
Declaratory ruling	3201, 3218
Administrative Law Judge Decision	
Abuse of process	3222
Character qualifications	3222
Financial qualifications	3144, 3196
Integration of ownership into management, quantitative aspect	3144, 3144
Real party in interest	3222
Reopening of record	3227
Staffing issue	3273
Orders or Notices	
Partnership	3170
Translator	3170
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	3273
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	3311, 3313 3319, 3320
Broadcasting - TV Stations	
Services	
Affiliations; network program practices; territorial exclusivity	3211
Cable Television Service	
Cablecasting	
Candidates for public office	3255
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	3134, 3241 3240, 3161 3270, 3300

Subject	Page
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	3271, 3331
Delegations of authority - General Counsel	
Authority delegated, listing of	3208
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	3205
Communications Act of 1934	
Common Carriers	
Damages, liability of carriers for	3190
Extension of lines, certificate for	3134, 3241 3161, 3323 3270, 3300
Service and charges	3190
Radio, provisions for	
Candidates for public office, facilities for	3255
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	3236, 3150
Licenses and allocation of facilities, term of	3222
Jurisdictional Separations Procedures	
Facilities and property	
C&WF(Category 1),apportionment procedures in exchange line	3248
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	3252
Common carriers: complaints, formal	
Cross complaints	3190
Hearing proceedings: evidence	
Rules of evidence, applicability of	3227
Hearing proceedings: presiding officer	
Authority of presiding officer	3227
Hearing proceedings: presiding officer's rulings	
Final ruling, appeal from	3210
Information, general	
Declaratory rulings	3251
Rules, suspension, amendment, waiver	3246
Time, computation of	3190

Subject	Page
Pleadings, briefs	
Extension of time, motions for	3206, 3207
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	3135, 3190
Public Mobile Service	
Transfers and assignments of applications	3265
Applications and licenses-filing requirements	
Amendment of applications	3321, 3286
Forms and permissive changes or minor modifications	3235
Applications and licenses-processing	
Grants by random selection	3265
Opposition to applications	3236
Domestic public cellular radio telecommunications service	
Applications, evaluation of	3286
Financial qualifications	3265
Frequencies available	3286
Service areas	3233
Public land mobile service	
One way signalling station, application provisions for a	3251
Satellite Communications	
Operation of stations, factors in	
Station identification requirement waived	3256
Technical standards	
Automatic Transmitter Identification System (ATIS) required	3256
Telecommunications Companies: Classes A and B	
Nonregulated activities	3205

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
(Bonne Broadcasting, Inc.) (Larose, LA)	3279
(Butte Broadcasting Company, Inc.)(Orland, California)	3281
(Dimitri Bankston) (Lima, Ohio)	3295
(Fine Arts Radio, Inc.) (Guilford, Connecticut)	3275
(Five Star Broadcasting, Inc.) (Pocomoke City, Maryland)	3263
(Fog Communications) (South Oroville, California)	3297
(Hughes-Moore Associates, Inc.) (London, Kentucky)	3277
(Jana R. Partridge) (Meridian, Mississippi)	3138
(Jireh's Broadcasting, Limited) (Jacksonville, North Carolin	3308
(Josephine Broadcasting Limited Partnership) (Erie, ennsylva	3162
(Kill Devil Hills Communications) (Kill Devil Hills, North C	3140
(Linda Ware d/b/a Lindsay Broadcasting) (Lindsay, California	3188
(RC Communication, Inc.) (Santa Barbara, California)	3165
(Rogersville Radio Broadcasting) (Rogersville, Alabama)	3282
(Rucker Radio) (Fort Rucker, Alabama)	3293
(Terry L. O'Quinn, et. al. d/b/a) (Walterboro, South Carolin	3284
(WMRI, Inc.)(Bremen, IN)	3306
000.251 Authority Delegated	3208
000.291 authority delegated	3271
000.291 authority delegated	3272
000.291 authority delegated	3331
000.331 Authority delegated	3264
001.002 Declaratory ruling.	3251
001.004 Computation of time	3190
001.017 Truthful written statements and responses to Commiss	3252
001.046 Motions for extension of time	3206
001.046 Motions for extension of time	3207
001.065(c) Substantial and significant changes in informatio	3252
001.106 Petitions for reconsideration	3135
001.106 Petitions for reconsideration	3190
001.1210 Prohibition on solicitation of Ex Parte Presentatio	3273
001.243 Authority of presiding officer	3227
001.302 Append Dismissed	3210
001.728 Formal Complaints not stating a cause of action	3190
022.009 Standard application forms and permissive changes or	3235
022.023 (c) Amendment of applications.	3286
022.030 Opposition to Applications	3236
022.033 Grants by random selection	3265
022.0902 (b) Frequencies	3286
022.525 One-way signaling stations	3251
022.903(a) Cellular System service area.	3233
022.916 Evaluation of cellular applications.	3286
022.917 Demonstration of financial qualifications	3265
022.922 Transfer and assignments of applicatios in RSAs	3265
025.206 Station Identification*	3256
025.308 Automatic Transmitter Identification System (ATIS)*	3256
032.014 Regulated Accounts	3204
032.023 Nonregulated Activities	3204
032.6124 General Purpose Computers Expense	3209
032.6724 Information Management	3209

	Page
047.000 C.F.R. § 1.3 - Good Cause	3246
047.000 C.F.R. § 36.154(a)	3248
047.000 C.F.R. § 64.702, Furnishing of Enhanced Services an	3231
063.001 Contents of Application	3270
063.001 Contents of Application	3328
063.001 Contents of Applications	3134
063.001 Contents of Applications	3161
063.001 Contents of Applications	3230
063.001 contents of applications	3240
063.001 Contents of Applications	3241
063.001 Contents of Applications	3242
063.001 Contents of Applications	3269
063.001 Contents of Applications	3300
063.001 Contents of Applications	3302
064.901 Allocation of Costs	3204
073.202 FM Table of Allotments	3243
073.202 FM Table of Allotments	3311
073.202 FM Table of Allotments	3319
073.202 FM Table of Allotments	3320
073.202, FM Table of Allotments	3313
073.202, FM Table of Allotments	3315
073.202, FM Table of Allotments	3317
073.3522 Amendment of applications	3273
073.658 Affiliation Agreements and Network Practices	3211
076.205 Origination cablecasts by candidates for public offi	3255
100.351 Rules of evidence	3227
300.201 Service and Charges	3190
300.206 Liability of Carriers for Damages	3190
300.214 Ext. of Lines	3323
300.214 Ext. of Lines	3328
300.214 Extension of Lines	3134
300.214 Extension of Lines	3161
300.214 Extension of Lines	3230
300.214 Extension of Lines	3240
300.214 Extension of Lines	3241
300.214 Extension of Lines	3242
300.214 Extension of Lines	3269
300.214 Extension of Lines	3270
300.214 Extension of Lines	3300
300.214 Extension of Lines	3302
300.223 Sechedule of Charges	3323
300.307 Allocation of Facilities; Term of Licenses	3222
300.309 Action in Authorization	3150
300.309 Action in Authorization	3299
300.309 Action Upon Applications	3236
300.315 Facilities for candidates for public office	3255
500.005, integration of ownership into management, qualitati	3201
500.005, integration of ownership into management, qualitati	3218
500.035 - Integration Quantitative	3170
500.045, diversification of control of mass media	3201
500.045, diversification of control of mass media	3218
500.125 - Misrepresentation	3170
500.170 - Financial Qualifiations	3170
500.3005 Integration of Ownership into Management, Qualitati	3144

500.3035 Integration of Ownership into Management, Quantitat 3144
500.3035, Integration of Ownership and Management 3192
500.3095 character qualifications 3222
500.3100 abuse of process 3222
500.3135 real party in interest 3222
500.3170 Financial Qualifications 3144
500.3170 Financial Qualifications 3196
500.3170 financial qualifications 3273
500.3185 staffing issue 3273
500.3200 reopening of record 3227

3144
3192
3222
3222
3222
3144
3196
3273
3273
3227

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NETWORK SERVICES, INC. File No. I-T-C-90-046

Application for authority to operate as an international resale carrier.

SAVANNAH TELCO, INC. File No. I-T-C-90-048

Application for authority to operate as an international resale carrier.

BC COMMUNICATIONS INC. File No. I-T-C-90-049

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 10, 1990; Released: May 21, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on December 27, 1989, January 5, 1990 and December 28, 1989, respectively, by Network Services, Inc. (NSI), Savannah Telco, Inc. dba Charter Network (Charter) and BC Communications Inc. (BC), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on January 31, 1990. No comments were received.

2. NSI is a non-dominant common carrier providing domestic resale services. Charter and BC are not now providing domestic resale services, but will become non-dominant international resellers. All the applicants propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In addition, BC proposes to provide telex service on a resale basis. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by NSI, Charter and BC, and international telex service on a resale basis by BC.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-046, I-T-C-90-048 and I-T-C-90-049 ARE GRANTED; and

a. NSI is authorized to provide international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and overseas points listed in those tariffs;

b. Charter is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 between the U.S. and overseas points listed in those tariffs; and

c. BC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and international telex services by the resale of telex service set forth in Western Union's Tariff F.C.C. No. 283 between the U.S. and overseas points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RICHARDSON INDEPENDENT SCHOOL DISTRICT	BPIF-840215DU BPIF-840913DD

For Licenses in the Instructional Television Fixed Service on Channels A1, A2, A3 and A4, Dallas, TX and Channels D1, D2, D3 and D4, Fort Worth, TX

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.	BPIF-831230DA BPIF-840224DA

For Licenses in the Instructional Television Fixed Service on Channels A2, A3 and A4, Dallas, TX and Channels D1, D2, D3 and D4, Fort Worth, TX

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1990; Released: May 21, 1990

By the Commission:

1. The Commission has before it: (a) a staff letter dated December 3, 1987 ("Dallas ruling"), which dismissed the above-captioned Dallas application (BPIF-831230DA) of Hispanic Information and Telecommunications Network, Inc. ("HITN"), and granted the above-captioned Dallas application (BPIF-840215DU) of Richardson Independent School District ("Richardson Schools");[1] (b) a staff letter dated December 3, 1987 ("Fort Worth ruling"), which dismissed the above-captioned Fort Worth application (BPIF-840224DA) of HITN, and granted the above-captioned Fort Worth application (BPIF-840913DD) of Richardson Schools; (c) "petition[s] for leave to file late filed motion[s] for extension of time" and "motion[s] for extension of time" in which to file petitions for reconsideration of the Dallas and Fort Worth rulings, filed by HITN on January 12, 1988, and related pleadings; and (d) petitions for reconsideration of the Dallas and Fort Worth rulings filed by HITN on January 15, 1988, and related pleadings.[2]

2. In dismissing HITN's applications for ITFS channels A2, A3 and A4 in Dallas and ITFS channels D1, D2, D3 and D4 in Fort Worth, both the Dallas ruling and the Fort Worth ruling stated that "[n]onlocal applicants are not eligible to compete for ITFS facilities with local applicants which filed before the end of the local priority period", under the policies established in *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83 - 523* (" *ITFS Second Report and Order* "), 101 FCC 2d 49 (1985). Each ruling stated that HITN was not a local entity in Dallas or Fort Worth, respectively, and had not amended either application to substitute a local applicant in its place, as provided for in *Memorandum Opinion and Order on Reconsideration* (" *ITFS Recon.*"), 59 RR 2d 1355, 1365 (1986). [3] Each ruling further stated that Richardson Schools was a local applicant which had filed its applications prior to the end of the local priority period, and that, therefore, Richardson Schools' applications were "entitled to consideration without consideration of the nonlocal part[y's] applications." Accordingly, each ruling dismissed HITN's respective applications.

3. In the pleadings now under consideration by the Commission, HITN requests that it be granted an extension of time in which to file its petitions for reconsideration or, in the alternative, that its "motion[s] for extension of time" be treated as timely filed petitions for reconsideration, and its January 15, 1988 pleadings be treated as "supplements" to its petitions for reconsideration under Section 1.106(f) of the Commission's Rules, 47 C.F.R. §1.106(f). These procedural requests will be denied.

4. In its "petition[s] for leave to file late filed motion[s] for extension[s] of time", HITN states that it did not receive copies of the December 3, 1987, Dallas and Fort Worth rulings until December 11, 1987; that "[d]ue to the normal press of business coupled with activities associated with the Christmas hol[id]ay, counsel did not turn his attention to the Commission's action prior to leaving Washington, D.C. on December 24, 1987"; that when counsel returned to work on January 4, 1988, he "reviewed half the mail that had accumulated by January 4.... [but] did not discover the outstanding letter[s]" dismissing HITN's Dallas and Fort Worth applications; that counsel was involved in a hearing proceeding from January 5 to 7, 1988, and, due to inclement weather which began on the evening of January 7, 1988, did not return to his office until January 11, 1988; and that "[o]n January 11, 1988, counsel discovered the subject letter[s], response[s] to which w[ere] already one week late." In its motions for extension of time, HITN cites "the unusual mail delay", "[t]he intervening Christmas and New Years holidays . . . (including the contiguous weekends)", and "8 days of non-rescheduleable commitments"; and asserts that, "[a]s a result of these events, counsel was in Washington only one business day between December 23, 1987, and January 10, 1988." HITN concludes, therefore, that "[t]he time remaining to counsel during the thirty day period . . . was not sufficient for preparation of a proper response." HITN further states that the Dallas and Fort Worth rulings are "dispositive of HITN's right in th[ose] cit[ies] and ha[ve] significant precedential effect over the Commission's handling of four channel waiver requests and the development of national ITFS networks."

5. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, provides that petitions for reconsideration " *must* be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of." (Emphasis added.)[4] For the purposes of Section 405, the terminal date of the thirty-day time period for filing petitions for reconsideration is determined in accordance with Section 1.4 of the Commission's Rules, 47 C.F.R. §1.4. On December 9, 1987, the Commission issued a Public Notice,

which announced the grant of Richardson Schools' Dallas and Fort Worth applications and the dismissal of HITN's applications (Report No. 20214). Accordingly, pursuant to Section 1.4 (b)(4) of the Commission's Rules, the first day to be counted in computing the terminal date for the filing of petitions for reconsideration in the instant proceeding was December 11, 1987, and the terminal filing date for petitions for reconsideration of the Dallas and/or Fort Worth rulings was January 11, 1988. HITN's petition for reconsideration was filed on January 15, 1988, four days late.

6. The Commission has consistently held that it is without authority to extend or waive the statutory 30-day filing period for petitions for reconsideration specified in Section 405 of the Communications Act. *Albert D. Maizels*, 20 FCC 2d 329 (1969); *Metromedia, Inc.*, 56 FCC 2d 909, 909-10 (1975), *reconsideration denied*, 59 FCC 2d 1189 (1976); *United Broadcasting Company of Florida, Inc.*, 61 FCC 2d 970, 972 (1976); *Panola Broadcasting Co.*, 68 FCC 2d 533 (1978); *Scripps - Howard Broadcasting Co.*, 69 FCC 2d 1477, 1478 (1978); *American Broadcasting Companies, Inc. (KGO - TV)*, 86 FCC 2d 1 (1981); *Commonwealth Telephone Company*, 2 FCC Rcd 5299, 5301 (1989); and *Reuters, Ltd. v. F. C. C.*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). This is so even if the petition for reconsideration is filed only one day late. *Metromedia, Inc., supra; Panola Broadcasting Co., supra.*

7. Although the Commission does not have the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration specified in Section 405 of the Communications Act, it may not refuse to consider a petition for reconsideration filed after the expiration of that period under "extraordinary circumstances" where: (1) such late filing was due to the Commission's failure, in violation of the Administrative Procedure Act and its own procedural rules, to provide a party with notice and the text of the action for which reconsideration is sought; and (2) such party acts with diligence and dispatch in preparing and submitting its petition for reconsideration when it learns of the action for which reconsideration is sought. *Gardner v. F. C. C.*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976). However, the court held that, where parties are given personal notice "within a reasonable time," the period for filing a petition for reconsideration will expire as specified in Section 405 of the Communications Act: thirty days after the date of public notice. *Id.* at 1091. Further, the court was careful to emphasize that:

> a defect in mailing notification will have legal consequence *only* where the delay in notification *in fact* makes it impossible reasonably for the party to comply with the filing statute. A petitioner has a burden to show (a) when and how he received notice in fact, (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement . . . of §405, and (c) that he moved for reconsideration promptly upon receiving actual notice.

(Emphasis added.) *Id.* at 1091-92 n. 24. The court went on to state that "it will be an extraordinary case . . . where a petitioner can meet that burden." *Id.*

8. In its January 25, 1988 "consolidated reply" to Richardson Schools' "consolidated opposition [to late filed pleadings]", HITN asserts that its "petitions for leave precisely met each of the[] requirements" specified in *Gardner v. F. C. C., supra.* However, it is clear that the justification for late filing submitted by HITN falls far short of the "extraordinary circumstances" necessary to bring the instant proceeding within the exception to Section 405 established in *Gardner*. Copies of the Dallas and Fort Worth rulings were received by HITN's Washington counsel on December 11, 1987, constituting personal notice "within a reasonable time", as specified in *Gardner v. F. C. C., supra* at 1091. Moreover, *Gardner v. F. C. C.* is not applicable where, as here, HITN has not alleged, much less demonstrated, that its procedural rights were violated by the Commission, or that the Commission was in any way or degree responsible for its late filing. *United Broadcasting Company of Florida, Inc., supra* at 972; *American Broadcasting Companies, Inc. (KGO-TV), supra* at 2. Further, as stated in paragraph 5, *supra*, the first day to be counted in computing the terminal date for the filing of petitions for reconsideration in the instant proceeding was December 11, 1987. HITN concedes that it received copies of the December 3, 1987 Dallas and Fort Worth rulings on December 11, 1987. Although HITN characterizes this as an "unusual mail delay", HITN had the full thirty days after its admitted receipt of the Dallas and Fort Worth rulings within which to prepare and timely file its petitions for reconsideration. *See, Metromedia, Inc. (reconsideration denied), supra* at 1190; *Sonderling Broadcasting Corp.*, 64 FCC 2d 731, 732 (1977); *New York Times Broadcasting (WREG-TV)*, 66 FCC 2d 340, 341 (1977); *Ridgewood Group*, 79 FCC 2d 588, 589 (1980). Counsel's workload does not constitute the "extraordinary circumstances" necessary to justify or necessitate acceptance of a late-filed petition for reconsideration. *Sonderling Broadcasting Corp., supra* at 731-32.

9. Although HITN asserts that its "petition[s] for leave to file late filed motion[s] for extension of time" and its "motion[s] for extension of time" were timely filed on January 11, 1988, the originals and all copies of those pleadings bear the stamp of the Office of the Secretary dated January 12, 1988. The Secretary's date stamp is authoritative and conclusive. Accordingly, HITN's "petition[s] for leave to file late filed motion[s] for extension of time" and its "motion[s] for extension of time" must be considered to have been filed on January 12, 1988, and were, therefore, untimely. As stated in paragraph 6, *supra*, the Commission is without authority to extend or waive the statutory 30-day filing period for petitions for reconsideration, even if the petition is filed only one day late. Therefore, even if HITN had intended its "motion[s] for extension of time" to be petitions for reconsideration, they would have to be dismissed as untimely. In any event, even if HITN's January 12, 1988 pleadings had been timely filed, both the captions and the content of those pleadings, and its later January 15, 1988 pleadings, clearly demonstrate that the January 12 pleadings were extension requests and only the January 15 pleadings constituted the substantive petitions for reconsideration.

10. In view of the foregoing discussion, it is clear that HITN's petitions for reconsideration were not filed within the statutory thirty-day time period mandated in Section 405 of the Communications Act, and that the "extraordinary circumstances" test of *Gardner v. F.C.C., supra*, has not been met. Accordingly, they are procedurally defective and must be dismissed.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 405 of the Communications Act, as amended, 47 U.S.C. §405, and Sections 1.106 (f) and (j), of the Com-

mission's Rules, 47 C.F.R. §§1.106 (f) and (j). HITN's "petitions[s] for leave to file late filed motion[s] for extension of time" and its "motion[s] for extension of time" in which to file petitions for reconsideration of the Dallas and Fort Worth rulings ARE DENIED; and That, HITN's "petition[s] for reconsideration" of the Dallas and Fort Worth rulings ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Dallas ruling also dismissed the applications of Bedford Stuyvesant Restoration Corporation for ITFS channels A2, A3 and A4 in Dallas (BPIF-840914FK), and National Conference on Citizenship for ITFS channels A1, A2, A3 and A4 in Dallas (BPIF-840206DT).

[2] These petitions for reconsideration, concerning staff actions taken pursuant to delegated authority, are referred to the Commission pursuant to Sections 1.104(b) and 1.106(a)(1) of the Commission's Rules, 47 C.F.R. §§1.104(b) and 1.106(a)(1).

[3] The local priority period and the ninety-day reconstitution period were upheld by the United States Court of Appeals for the District of Columbia in *Hispanic Information and Telecommunications Network, Inc. v. F.C.C.*, 865 F.2d 1289 (D.C. Cir. 1989).

[4] *See also*, Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-229

In re Applications of

JANA R. PARTRIDGE (hereafter "Partridge") — File No. BPH-880505MF

CIRCLE COMMUNICATIONS, INC. (hereafter " Circle") — File No. BPH-880505NK

RADIO MERIDIAN, L. P. (hereafter "RMLP") — File No. BPH-880505PP

CHARISMA COMMUNICATIONS CO. (hereafter "Charisma") — File No. BPH-880505PU

EARNEST TIGER AND HAROLD MCBRAYER (hereafter "Tiger") — File No. BPH-880505OL (Previously Returned)

For Construction Permit
for a New FM Station on Channel 271A
(102.1 MHz) in Meridian, Mississippi

HEARING DESIGNATION ORDER

Adopted: April 18, 1990; Released: May 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On November 22, 1989, the application filed by Tiger was returned as unacceptable for filing for inconsistencies between the coordinates listed in Sections V-B and V-G of FCC Form 301 and the coordinates plotted on the topographical map submitted with the application. In addition, the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) specified in the application exceeded the maximum ERP/HAAT combination allowed for Class A facilities. As the return letter noted, these inconsistent data made it "impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval." On January 4, 1990, Tiger filed a cover letter accompanied by an amendment which corrects the inconsistencies in its proposal.

3. By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission promulgated new processing procedures for commercial FM applications. These procedures, *inter alia*, restrict the period of time within which amendments of applications may be filed. *See* Paragraph 31 and Appendix D of the *Report and Order*, above, as well as Section 73.3522(a)(6) and 73.3564(a) of the Commission's Rules. Since the adoption of the new processing rules, the Commission has clearly stated that applicants may not correct acceptability defects after the time for filing amendments as of right. *See e.g. Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988). As the last date for filing amendments as of right was August 17, 1988, the January 4, 1990 attempt to amend the deficient application was clearly untimely.

4. Moreover, to properly lie, a request for reconsideration of a finding of unacceptability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that such finding concerning the application *as originally filed* was erroneous. *See* the *Report and Order*, above, and Section 1.106(d)(2) of the Rules.

5. The instant cover letter, even if considered as a petition for reconsideration, does not demonstrate that the finding of unacceptability of the subject application as originally filed is erroneous. Rather, it appears to admit that the application as originally filed was unacceptable and merely submits corrected data. Therefore, reconsideration is not warranted. Accordingly, the amendment will be returned, and the "petition" for reconsideration denied.

6. *RMLP.* Our engineering review of RMLP's application has revealed a discrepancy in the tower height above mean sea level. The applicant has specified construction of a 140 meter tower at a site elevation of 170 meters. These rounded figures match the values of 140.2 meters (559 feet) for the overall tower height and 170.4 meters (1019 feet) for the site elevation as notified to the FAA. In Section V-B, Item 7 of the Form 301, RMLP has added the figures 140m + 170m to determine that the overall height of the tower above mean sea level is 310 meters. However, the addition of FAA values give 140.2 + 170.4 = 310.6 meters for this parameter. It is clear that this discrepancy arises from the rounding procedure used. In order to conform with the FAA clearance for this structure, RMLP is required to file with the presiding Administrative Law Judge within 30 days of the release of this Order a clarifying amendment to specify the overall tower height above mean sea level as 310.6 meters.

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Circle have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Circle would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. The applicants listed below petitioned for leave to amend their application on the dates indicated. The accompanying amendments were filed after August 17, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Partridge	December 30, 1988; May 10, 1989 (engineering); June 6, 1989; January 19, 1990
Charisma	June 19, 1989; October 19, 1989; February 2, 1990

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Circle would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FUTHER ORDERED, That Tiger's January 4, 1990 amendment IS HEREBY RETURNED, and the accompanying "Petition" for reconsideration IS DENIED.

12. IT IS FURTHER ORDERED, That RMLP shall submit an amendment as required by paragraph 6, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Partridge and Charisma ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-190

In re Applications of

KILL DEVIL HILLS COMMUNICATIONS LIMITED PARTNERSHIP (hereafter: Communications)	File No. BPH-880406MF
OCEANSIDE COMMUNICATIONS, INC. (hereafter: Oceanside)	File No. BPH-880407MP
FIRST FLIGHT BROADCASTING LIMITED PARTNERSHIP (hereafter: First)	File No. BPH-880407MR
EDWARD FENTON LAWLER (hereafter: Lawler)	File No. BPH-880407MS
KDH BROADCASTING, LIMITED PARTNERSHIP (hereafter: KDH)	File No. BPH-880407MT
GREAT SCOTT BROADCASTING (hereafter: Scott)	File No. BPH-880406MD (Dismissed Herein)
COASTAL RADIO LIMITED PARTNERSHIP (hereafter: Coastal)	File No. BPH-880407MB (Previously Returned)

For Construction Permit for a New FM Station on Channel 281C1, Kill Devil Hills, North Carolina

HEARING DESIGNATION ORDER

Adopted: March 22, 1990; Released: May 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* On January 17, 1990, Scott requested dismissal of its application. On January 29, 1990, Scott submitted its affidavit of no consideration. Accordingly, Scott's application will be dismissed herein.

3. Coastal's application was returned by the Chief, FM Branch, on March 2, 1989, as unacceptable for filing because its application, as originally tendered, specified facilities which are greater than that allowed for a Class C1 allocation. The maximum facilities for a Class C1 allocation are 100 kW effective radiated power (ERP) at an antenna height above average terrain (HAAT) of 299 meters. *See* 47 C.F.R. § 73.211(b)(1). Coastal specified facilities of 100 kW ERP at an antenna HAAT of 300 meters, which defines minimum Class C facilities. *Id.* As noted in the return letter, the critical nature of the maximum antenna HAAT in defining class is brought out in 47 C.F.R. § 73.211(b)(1)(ii), which states:

> If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 3 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 24 km in both cases.

4. On April 12, 1989, Coastal filed a Petition for Reconsideration of the return of its application and requested that its application be reinstated *nunc pro tunc*. Coastal claims that its application as originally tendered does propose facilities in compliance with the height and power limitations of 47 C.F.R. § 73.211, but that due to its compliance with 47 C.F.R. § 73.212, the rounding rule, it appeared superficially that those limitations were exceeded when in fact they were not. Specifically, Coastal claims compliance with 47 C.F.R. § 73.211(b)(2), which states in pertinent part:

> If a station has an antenna HAAT greater than the reference HAAT for its class, its ERP must be lower than the class maximum such that the reference distance does not exceed the class contour distance.

Coastal claims that it specified 300 meters HAAT and reduced its ERP to 99.5 kW to offset the reference HAAT of 299 and thus was in compliance with 47 C.F.R. § 73.211(b)(2). Coastal argues, however, that its further compliance with 47 C.F.R. § 73.212, which specifies a procedure for rounding, to the nearest kilowatt, the transmitter output power and effective radiated power of FM stations, resulted in its ERP being rounded from 99.5 to 100 kW, thereby making it seem as though it had specified Class C facilities when in fact in had not. Coastal contends that it is patently observable within the four corners of its application that its engineer had made the appropriate power reduction so that the final computation would comply with 47 C.F.R. § 211, and that, drawing on the application as a whole, the processing staff should have realized that Coastal had read the two rules in order and had strictly adhered to both of them.

5. We disagree. Nothing in Coastal's application as originally tendered gave even the slightest notice that Coastal did what it now claims to have done. Thus, drawing on the application as originally tendered as a whole, the only conclusion the engineering staff could have

reached was that Coastal was proposing Class C facilities. Had Coastal included in its application as originally tendered the explanation it now presents in its Petition for Reconsideration, the outcome would be different. However, given that it did not, we find that the return of Coastal's application was entirely correct. Coastal has thus shown no error of fact or law as required by 47 C.F.R. § 1.106(d)(2). Accordingly, Coastal's Petition for Reconsideration will be denied, and its resubmitted application, as amended on March 13 and May 16, 1989, will be dismissed.

6. By letters dated July 6, 1988, WOBR, Inc., licensee of radio station WOBR(AM), Wanchese, North Carolina, filed informal objections against each applicant. WOBR claims that each applicant's proposed location of its FM transmitter and tower is sufficiently close to WOBR(AM)'s transmitter so as to possibly interfere with WOBR(AM)'s directional antenna system. WOBR thus requests that the winning applicant's permit be made subject to the condition that the applicant "bear all expenses, including but not limited to legal and engineering fees, associated with a proof of performance of WOBR(AM)'s antenna system both prior to and after construction of its new FM station and any modifications to WOBR(AM)'s transmission system which may be necessary as a result of [the winning applicant's] construction of the proposed new facility." The Commission's processing procedures for FM applications provide for a condition protecting a directional AM station, such as WOBR(AM), in the event an FM station proposes to locate its tower within two miles of the tower of the AM station. The condition states that:

> Prior to construction of the FM tower authorized herein, permittee shall notify AM station _____ so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse affects upon the radiation pattern of the aforementioned AM station. Both prior to construction of the FM tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, BEFORE FM PROGRAM TESTS COMMENCE, the results submitted to the Commission and to the AM station.

Communications, KDH and Scott are the only applicants who propose to locate within a 2-mile radius of WOBR(AM). Thus, in the event that the construction permit is awarded to Communications, KDH or Scott, a condition protecting WOBR(AM) will be attached upon issuance of the construction permit. Accordingly, WOBR's informal objections will be dismissed.

7. *Communications.* On June 24, 1988, Communications amended its application as a matter of right to specify a different transmitter site than that specified in its application as originally filed. On June 19, 1989, Communications petitioned for leave to amend its application. The petition was accompanied by an amendment specifying a move back to the transmitter site specified in its application as originally filed but at a lower height. The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, Communications states that, by letter dated May 16, 1989, it was advised by the Federal Aviation Administration (FAA) that its proposal "would cause substantial adverse effects upon air navigation." Communications states that although the FAA has not yet issued a final "Determination of Air Hazard," in light of the initial evaluation, it decided to amend its application to change back to its original transmitter site. Communications has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Accordingly, Communication's Petition for Leave to Amend will be granted and its associated amendment will be accepted. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

8. Joseph G. Ratcliffe, Communications' sole general partner, is General Manager of radio station WRSF-FM, Nags Head, North Carolina. This station is close enough in proximity to Kill Devil Hills that the combination of broadcasting interests could violate the Commission's cross-interest policy. However, Ratcliffe has indicated his intent to terminate his relationship with WRSF-FM in the event of grant of the referenced application. Accordingly, in the event of grant of Communications' application, Ratcliffe will be required to sever all connections with WRSF-FM prior to the commencement of program test authority.

9. *First.* On November 29, 1988, First petitioned for leave to amend its application. The petition was accompanied by an amendment correcting an error in the engineering section of its application. First states that the error involved listing the average elevation of each of the cardinal radials (AAT) in Item 19, Section V-B, Page 4, FCC Form 301, rather than the height of radiation center above average elevation of the radials (HAAT), and that it has attached a corrected Page 4 to the amendment. First also states that since both the average elevation for each radial and the height of the center of radiation above average elevation of each radial were correctly provided on Table II of the original engineering statement submitted with the application, drawing on the application as a whole, the staff had available to it the correct information. First therefore contends that its amendment is acceptable. Pursuant to Section 73.3522 of the Commission's Rules, after the period for amendment as of right has expired, predesignation amendments will be considered only upon a showing of good cause for late-filing; pursuant to Section 1.65; or pursuant to Section 73.3514, which permits the Commission to order an applicant to amend its application to make it more definite and certain. Since the staff could, drawing on the application as a whole, confidently and reliably determine the correct HAAT values, First's amendment is the type we would request pursuant to Section 73.3514. While we would normally direct that the amendment be submitted to the presiding Administrative Law Judge within 30 days of release of this Order, for administrative convenience, we will accept herein First's November 29, 1988 amendment. However, an applicant may not improve its com-

parative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

10. *KDH*. In KDH's application as originally filed, it proposed a tower height of 168 meters (551 feet). On November 21, 1988, the FAA issued a "Determination of No Air Hazard" for a tower height above ground level of 500 feet. On December 29, 1988, KDH petitioned for leave to amend its application. The petition was accompanied by an amendment lowering the tower height to 152 meters (499 feet). The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, KDH stated that it was lowering the tower height to comply with the conditions of the FAA's "Determination." KDH has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Accordingly, KDH's Petition for Leave to Amend will be granted and its associated amendment will be accepted. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

11. Kenneth L. Mann, KDH's sole general partner, is President and General Manager of Coastal Broadcasting Co., Inc., permittee of WNHW(FM) (BPH-861014TE), Nags Head, North Carolina. He is also a 12.25% stockholder of Coastal. This station is close enough in proximity to Kill Devil Hills that the combination of broadcasting interests could violate the Commission's cross-interest policy and its duopoly rule, 47 C.F.R. § 73.3555(a). However, Mann has indicated his intent divest all interest in, and sever all connection with, Coastal Broadcasting Co., Inc. and WNHW(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of KDH's application, Mann will be required to divest all interest in, and sever all connection with, Coastal Broadcasting Co., Inc. and WNHW(FM) prior to the commencement of program test authority.

12. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Lawler has filed such statement, it is deficient in that Lawler has not listed a specific female-oriented organization for recruitment purposes. Accordingly, Lawler will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

13. *Late-filed Amendments*. KDH has petitioned for leave to amend its application on March 22, 1989 and December 12, 1989. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

14. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. *Air Hazard*. The FAA has determined that the antenna supporting structure proposed by First and Lawler constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by First and Lawler would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That, pursuant to its request, Scott's application IS DISMISSED.

19. IT IS FURTHER ORDERED, That Coastal's Petition for Reconsideration IS DENIED, and its resubmitted application, as amended, IS DISMISSED.

20. IT IS FURTHER ORDERED, That the informal objections filed by WOBR, Inc. against each applicant ARE DISMISSED.

21. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Communications on June 19, 1989 IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That, in the event of grant of Communications' application, Joseph G. Ratcliffe will be ordered to sever all connections with station WRSF-FM prior to the commencement of program test authority.

23. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by First on November 29, 1988, IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by KDH on December 29, 1988, IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

25. IT IS FURTHER ORDERED, That, in the event of grant of KDH's application, Kenneth L. Mann will be ordered to divest all interest in, and sever all connection with, Coastal Broadcasting Co., Inc. and WNHW(FM) prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Lawler shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

27. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by KDH ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

28. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

29. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The application of Barco FM Partnership (ARN-880407MQ) was returned as unacceptable for filing on March 2, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-238

In re Applications of

RONALD SORENSON	File No. BPH-870430MM
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-870430MO
MIDWEST RADIO, INC.	File No. BPH-870430MQ
SANTEE BROADCASTING, INC.	File No. BPH-870430MV
ASTERISK BROADCASTING, INC.	File No. BPH-870430NB
Beverly J. Hewitt, Ruth Sirko, et al. d/b/a HIGH TOWER PARTNERSHIP	File No. BPH-870430ND

For Construction Permit for
New FM Station, Channel 298C2,
(107.5 MHz) at Des Moines, Iowa

Appearances

Donald E. Martin, Spencer W. Weisbroth and *Barry Skidelsky*, on behalf of *Ronald Sorenson* ; *Joel H. Levy* and *Richard A. Helmick*, on behalf of Clear Channel Communications, Inc.; *Edward W. Hummers, Jr., Vince J. Curtis Jr., Robert A. DePont* and *Jill F. Pender*, on behalf of Midwest Radio, Inc.; *Richard F. Swift*, on behalf of Santee Broadcasting, Inc.; *Dennis F. Begley* and *Matthew H. McCormick*, on behalf of Asterisk Broadcasting, Inc.; and *David D. Oxenford, John K. Hane*, and *Lisa C. Wilson*, on behalf High Tower Partnership.

DECISION

Adopted: May 1, 1990; Released: May 22, 1990

By the Review Board : MARINO (Chairman), and BLUMENTHAL. Board member ESBENSEN is issuing a separate statement.

Board Member BLUMENTHAL :

1. The Review Board has before it: (1) the *Initial Decision*, 4 FCC Rcd 6961 (1989) (*I. D.*), of Administrative Law Judge Walter C. Miller (ALJ), granting the application of Ronald Sorenson (Sorenson) for authority to construct a new commercial FM broadcast station on Channel 298C at Des Moines, Iowa, and denying the above-captioned mutually exclusive applications; [1] (2) exceptions filed by the parties, and reply exceptions by all save Clear Channel Communications, Inc. (Clear Channel) and Asterisk Broadcasting, Inc. (Asterisk); and (3) a motion to enlarge issues filed October 19, 1989 by Sorenson (and pleadings responsive thereto). An oral argument was held before the Board on March 9, 1990. Based on our review of the *I.D.*, the underlying record, the pleadings before us, [2] and the oral argument, we adopt the ALJ's findings of fact, except as modified herein, and affirm his grant of Sorenson's application.

2. The *I.D.* selected Sorenson as the comparatively superior applicant under the standard comparative issue (the only issue tried), employing the criteria of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). The ALJ determined that only Sorenson and Midwest were entitled to 100% quantitative "integration" credit for proposing fulltime integration of ownership and management. [3] Neither applicant was assessed a diversification demerit for other media interests. Conversely, Clear Channel and Asterisk did not seek any "integration" credit, and both were assessed "decisive" diversification demerits for numerous other media interests. *I. D., Concls.*, paras. 3-4. High Tower received less than 100% quantitative "integration" credit and a "substantial" diversification demerit. Finally, Santee, which was assessed no diversification demerit, failed to sustain its 100% quantitative "integration" claim. *I. D., Fdgs.*, para. 75. As between Sorenson and Midwest, the ALJ concluded that:

> neither Sorenson nor Midwest should be preferred because of a superior areas and populations proposal. While Midwest serve[s] a slight[ly] greater population than Sorenson, there is really no large population disparity between the two proposals, and no underserved areas are involved. So Midwest is entitled to a *very slight non - decisive preference* under the *Comparative coverage* factor.
>
> * * *
>
> Ronald Sorenson earns a *moderate* preference over Richard Eychaner [Midwest] under the *local residence* criterion. But that preference is cancelled out by Eychaner's moderately superior participation in Des Moines' civic affairs.
>
> It is in the area of *past broadcast experience* that Sorenson earns his winning comparative edge. On this criterion he warrants a *substantial* preference over Eychaner. His past broadcast experience has been both rich and varied. When you combine this past experience with his lifelong residence, the conclusion is inescapable that Ronald Sorenson should be preferred over Midwest Radio, Inc. It is Sorenson that will offer the best practicable service to the Des Moines public.

I.D., Concls., at paras. 17, 19-20 (citations and footnotes omitted).

EXCEPTIONS

3. As a preliminary matter, neither Asterisk nor Clear Channel excepts to the ALJ's comparative analysis. Rather, Asterisk seeks a reformation of the comparative hearing process, relief which that applicant correctly acknowledges strays beyond the Board's delegated authority. No further treatment regarding that applicant's exceptions is therefore necessary. [4] Clear Channel charges that the ALJ erred in denying its motion to require that the other applicants supply contemporaneous written documentation of their financial qualifications. Clear Channel had been required to submit such documentation as a result of its participation in an unrelated proceeding (MM Docket No. 88-421 for FM Channel 298A at Columbus, Ohio), where all of the parties to that case were randomly selected by the Commission for a financial audit. [5] However, as the ALJ properly observed in rejecting Clear Channel's motion here:

> [t]he financial audit is a prehearing procedure, not a hearing procedure. It is employed on a random basis, and in this case the Chief, Audio Services Division, decided not to employ it. *See* 53 F.R. 19042 released May 20, 1988, para. 4. The Presiding Judge is bound by that analysis. *See Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965): *Atlantic Broadcasting Company, WUST et al.*, 5 FCC 2d 717 (1966); and *Anax Broadcasting, Inc.*, 87 FCC 2d 483, at 486 (1981).

Memorandum Opinion and Order, FCC 88M-2050, released July 1, 1988. There are no legal grounds justifying such an inquiry at this juncture of the proceeding without a demonstrated showing (pursuant to 47 CFR §1.229(d)) that a substantial and material question of fact exists regarding any other instant applicant's respective financial qualifications. *Priscilla Schwier*, 4 FCC Rcd 2659 (1989), *aff'd per judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. Feb. 7, 1990). [6]

4. Further, Santee conceded at oral argument that, even if it were awarded the quantitative "integration" credit it seeks, [7] it could not prevail unless the comparative proposals of both Sorenson and Midwest were discounted, or the two leading applicants were otherwise eliminated from consideration. Tr. of Oral Arg. 807. Neither can High Tower prevail over Sorenson and Midwest, because of its (undisputed) diversification and integration disadvantage. In light of our affirmance of the ALJ's grant of the Sorenson application, the exceptions relating to the other applicants are non-decisional, and will be considered only as they have a bearing on Sorenson's application. *See* 47 CFR § 1.282(b).

Integration

5. Ronald Sorenson filed his application as an individual applicant and sole proprietorship. He received 100% quantitative integration credit based on his proposal to work fulltime as general manager of the proposed station. High Tower and Santee challenge this award of quantitative credit, arguing that Sorenson's purported lack of prior experience and disdain of sales activities make it highly likely that he will be required to secure new principals to assist in the operation of the proposed facility.

6. It is well established that where "an applicant sets forth a specific 'integration' proposal, does not depart from it, and provides reasonable assurance that it will be carried out," the proposal will be credited. *Bradley, Hand, and Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982). Here, the exceptors have offered nothing but speculation that Sorenson cannot, or will not, effectuate his integration proposal. Moreover, broadcast experience has never been, by itself, a prerequisite for receiving integration credit, *see United Broadcasting Co., Inc.*, 94 FCC 2d 938, 956 (Rev. Bd. 1983), *modified on other grounds*, 57 RR 2d 885 (1985). In any event, Sorenson's past broadcast experience, *see I. D., Fdgs.*, paras. 35-38, belies the exceptors arguments on this point. Finally, even a cursory examination of the record reveals that he intends to supervise a sales manager and staff. Tr. 261. Based on the foregoing, we affirm the ALJ's quantitative integration award.

7. Midwest objects to the ALJ's analysis of the qualitative enhancements, as it relates both to Sorenson's and its own integration proposals. It would eliminate the "moderate" preference awarded Sorenson for local residence, as predicated on the findings that Sorenson had lived in Des Moines all 41 years of his life, whereas Midwest's sole voting stockholder, Richard C. Eychaner, [8] initially moved to Des Moines in 1975. *I. D., Concls.*, para. 10. Citing *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 187 (Rev. Bd. 1986)(subsequent history omitted), Midwest argues that both Sorenson and Eychaner have spent equivalent amounts of their adult lives in Des Moines. Midwest further argues that Eychaner's greater civic involvement, *see I.D. Fdgs.*, paras. 55-58, at least equalizes the two in terms of familiarity with Des Moines.

8. We will not disturb the preference accorded Sorenson under this factor. At the outset, *Jarad* is not apposite. There an applicant sought enhancement credit for the service area residence of one of its principals who had previously lived in the proposed service area from birth until the age of three or four, and who had also attended college there. The Board observed that such a tenuous connection with the service area did little to further one's knowledge of, or appreciation for, the needs and problems of the service area, and we awarded only minor credit. Here, however, Sorenson has lived his entire life in the community of license. In conferring enhancement merit for local residence, "knowledge of the community of license will be reflected in a station's programming." *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985); *Policy Statement*, 1 FCC 2d at 396. [9] It has been a long-standing practice to award greater enhancement to applicants whose principals have the longer residences in the community of license. *See generally Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) (16 more years residence entitled to preference) (subsequent history omitted). Finally, the residence preference, *per se*, is not diminished because of Eychaner's local civic participation. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984) (local residence enhancement separate from civic enhancement), *review denied*, 100 FCC 2d 941 (1985). [10]

9. Midwest next seeks to increase its credit for civic activities to "substantial," claiming that its superiority on this enhancing factor was "relatively" diminished when the ALJ erroneously included among Sorenson's civic activities the Public Service Announcements ("PSAs") selected and aired by Sorenson over a local cable facility,

see I.D., Fdgs., paras. 38-39. Midwest also claims that Sorenson's own local civic activities are dated and insubstantial.

10. As noted in Sorenson's reply exceptions (at 7-8), his participation in preparing the PSAs, to which he devotes a minimum of two hours per week, *see I.D., Fdgs.*, para. 39, is not a requirement of his occupation, and is entirely voluntary. Thus, we notice the ALJ's observation that:

> since 1975, Sorenson has been aiding all sorts of Des Moines' civic groups by producing, scheduling, and programming their public service announcements. That is certainly a commendable activity, and shouldn't be analyzed lightly.

I.D. at n.18. Those activities can be expected to familiarize him with the needs and problems of the community and expose him to the programs and objectives of many of the Des Moines service organizations. Moreover, Midwest's assertion that Sorenson's remaining civic activities are dated and insubstantial is not supported by the record. Sorenson continues to participate in the Drake Neighborhood Association, where he previously served to benefit the Iowa Farm Unity Coalition and the Food Bank of Iowa. *I.D., Fdgs.*, para. 42. Earlier, he had served as a delegate to the 1972 Democratic Party Conventions at the district, county, and state levels. *Id.*, para. 40. In sum, Eychaner's involvement in civic affairs is cognizable, *see I.D., Fdgs.*, paras. 55-58, and so is Sorenson's.

11. Finally, Midwest would eliminate the "substantial" past broadcast experience preference bestowed on Sorenson. The ALJ credited Sorenson's past broadcast experience as (1) an announcer at KFMG-FM, Des Moines from 1967-1969; (2) KFMG-FM's program director from 1969-1971; (3) Midwest Regional Radio Network Coordinator for the McGovern Presidential Campaign in 1972; (4) and owning and operating "KBLE-FM Cable," an audio production service which has distributed programming over the Des Moines cable system from 1975 to the present. *Id., Fdgs.*, paras. 35-38. Eychaner was credited with producing, since 1980, a weekly local public affairs discussion program for the Iowa Cable Network, and for serving during 1982-1983 as a color commentator for the Iowa Cubs baseball team on the local cable station. Midwest argues, however, that the ALJ erroneously included the McGovern Presidential Campaign experience in Sorenson's credits, notwithstanding that the ALJ had previously struck the testimony from the record; that he further erred in crediting the cable production service, though he had ostensibly ruled that it did not constitute a cognizable media service; that Sorenson is not entitled to any credit for the cable production service, since he did not claim it; and that Sorenson's experience from 1967-1972 is too dated to receive significant weight.

12. We concur with the ALJ that Sorenson is entitled to an advantage for his past broadcast experience. Thus, Sorenson is credited for experience at KFMG-FM, Des Moines from 1967-1971, part of which was managerial. The Commission does not discount or diminish noncurrent broadcast experience. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 847, 849 (Rev. Bd. 1981) (subsequent history omitted). However, Midwest is correct that Sorenson's work with the McGovern Presidential Campaign should not be included as part of Sorenson's past broadcast experience; that testimony was stricken from the record, without objection by Sorenson, *see* Tr. 63-64, and Sorenson does not here contest the exception. Neither applicant is entitled to include as past broadcast experience activities at cable facilities. Midwest's reliance on *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988), is misplaced. That case did not involve a cable system. Under existing Commission policy, enhancement is awarded only for communications experience having a clear nexus with broadcasting, *see Policy Statement*, 1 FCC 2d at 396. "Broadcasters and cable operators ... have radically different public responsibilities under the Communications Act and present FCC regulations." Tele-Media *Corp. v. FCC*, 697 F.2d 402, 412 (D.C. Cir. 1983).[11]

Diversification

13. Midwest, High Tower, and Santee also contend that the ALJ erred in not assessing Sorenson a diversification demerit for his ownership of "KBLE-FM Cable." The enterprise provides a 24-hour music service carried by Heritage Cablevision, a local cable system. *Id.* It also runs public announcements. In the distant past, it carried some public discussion programs, but currently carries no news or public affairs programming. Tr. 248. The programming is available only to those cable viewers that subscribe to an additional FM package service (consisting of 20 miscellaneous services), such subscribers at the time of hearing numbering approximately 4000. Tr. 244. Sorenson has taken the position that the programming service is not a cognizable media interest for diversification purposes (*see* Sorenson Application, Exh. 1; Hearing Exh. 6), but indicated his intention to divest himself of the facility should the Commission disagree. *Id.* The ALJ ruled that Sorenson had timely pledged to divest himself of the enterprise if his application were granted, and thus held that Sorenson had no attributable media interests. [12] *I.D., Fdgs.*, para. 16. The exceptions argue, however, that Sorenson's pledge to divest is too equivocal to be credited, and that his interest is cognizable for diversification purposes.

14. Although we are in partial agreement with the exceptors, we conclude that Sorenson's programming service is too insignificant to have any meaningful impact under this important criterion. Initially, we do find Sorenson's divestiture pledge too contingent to be credited. It reads in pertinent part as follows:

> Mr. Sorenson's position is that [the KBLE] programming service is not sufficiently cognizable as a mass media interest to warrant any diminishment of his 100% diversification credit to be claimed. Nonetheless, in the interests of full and fair disclosure, such programming service interest is hereby stated for the record.
>
> Moreover, should such position not be shared by the Federal Communications Commission, Mr. Sorenson hereby states for the record his intent to divest such interest *if required* and in the event of a grant of this application.

Sorenson Application, Exh. 1 (emphasis added). Although Sorenson argues that applicants should not be penalized for failing to make unqualified divestiture pledges where doubt exists as to whether a medium is cognizable for diversification purposes, we are daunted by the problems inherent in crediting contingent pledges that depend on post-cut-off legal determinations. For example, we can

envision a contingent divestiture pledge in which an applicant promises to divest another broadcast property, *if* the Commission considers the diversification demerit so strong as to cause the applicant to lose comparatively. (*E.g.*, applicant believes media interest to require only "slight" demerit, but Commission finds interest "substantial.") Here, Sorenson's pledge has two conditions: first, it is contingent on the programming service being found to be a communications medium (which it is); and, second, Sorenson pledges to divest the interest " *if required* " by the FCC (which it is not). [13] We find that a date certain for freezing proposals, particularly comparative proposals, is necessary to ensure that cases are tried in an orderly and timely fashion. A stablization of proposals prior to hearing "clearly delineat[es] the issues and scope of hearings and permit[s] adequate preparation and presentation by all of the parties." *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1029 (Rev. Bd. 1980), *review denied*, FCC 80-736, released December 4, 1980, quoting *Kent - Ravenna Broadcasting Co.*, 44 FCC 2669-70 (1961). Applying "contingent" application promises is difficult enough where the operative conditions are relatively more objective, *see Metro Broadcasting Inc.*, 99 FCC 2d 688, 702 (Rev. Bd. 1984) (contingent "integration" pledges)(subsequent history omitted), and attempting to apply contingent proposals which turn on a post cut-off interpretation of the rules or case law would create an untenable uncertainty in the process, to the prejudice of competing applicants. We have not, and shall not, honor such contingent pledges.[14]

15. Next we deal with Sorenson's view that his music service (he also describes it as a production company) should be deemed a media interest. The law holds that, although a program production interest can be considered a medium of mass communications cognizable under the Commission's diversification criterion, if significant, *see, e.g., Golden State Broadcasting Corp.*, 94 FCC 2d 212, 214 (Rev. Bd. 1983) (company producing program aired on 21 in-state stations cognizable, *but for* production company owner's *de minimis* (2%) interest in broadcast applicant) (subsequent history omitted), [15] such interests will not be elevated to a level cognizable under our diversification policies absent evidence that they would undermine the objectives of diversification, *i.e.*, "maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest." *Morris, Pierce & Pierce*, 88 FCC 2d 713, 724 (Rev. Bd. 1981). Thus, under this test, the Board has held that the production of a weekly religious television program seen in three cities by a 27.8% principal to be of no comparative weight. *Focus Television Co.*, 98 FCC 2d 546, 553, 554 n.13 (Rev. Bd. 1984) (subsequent history omitted). And we have charged no demerit to an applicant for ownership of a company producing a series of national video programs, none of which were viewed in-state. *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3142 (Rev. Bd. 1988). In *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1498-1499 (Rev. Bd. 1979), *review denied*, FCC 79- 397, released June 21, 1979, the case most analogous here, the Board held that a background music distribution business using an FM subchannel on an existing station did not constitute a medium of communications in any sense relevant to our diversification policies. Although *Midwest* varies slightly from the facts here, in that the service these consisted entirely of music, whereas Sorenson conceded that his facility has carried discussion programs, Sorenson's service is also essentially background music, and received only by 1% (approximately) of the population of the proposed service area. Moreover, it is but one of the twenty audio services packaged by the cable company, and his service is terminable at will by the cable system. *See also Signal Ministries, Inc.*, 104 FCC 2d 1481, 1492-1493 n.11 (Rev. Bd. 1986) (non-ownership relationship to local cable franchisee too insignificant under diversification), *review denied*, 2 FCC Rcd 1259 (1987), *aff d by judgment sub nom. Adelphia Broadcasting Corp. v. FCC*, 838 F.2d 671 (D.C. Cir. 1988)(Table).

Comparative Coverage

16. Midwest contends that the "very slight" preference it received for its comparative coverage advantage over Sorenson was error. In this regard, Midwest asserts that it will serve 7% more population than Sorenson, and a larger area. We perceive no error. In *Susan Mulkey*, 3 FCC Rcd 590, 593 (Rev. Bd. 1988), a "very slight" coverage preference was accorded by the Board to the applicant with the superior coverage proposal, not a "slight" preference as contended by Midwest. On appeal, the Commission eliminated even this preference, finding the coverage differences nondecisional. Thus, Midwest's reliance on *Mulkey* is unavailing. Moreover, Sorenson refers us to *Cotton Broadcasting Co.*, 104 FCC 2d 473, 477 (Rev. Bd. 1986) (subsequent history omitted), where an applicant proposing to provide a 7.5% overall population advantage merely received, as here, a "very slight" preference. *See also Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 421 (Rev. Bd. 1984) (no preference where a purported 10% population deviation separated the largest and smallest proposals), *aff'd*, 59 RR 2d 787, 789 (1985)(subsequent history omitted).

COMPARATIVE SUMMATION

17. As the ALJ correctly perceived, Sorenson and Midwest "clearly stand head and shoulders comparatively above the other four" applicants. *I.D., Concls.* at para. 15. They are equal under the "diversification" objective, neither having been charged with a demerit. On "integration," both applicants receive 100% quantitative "integration" credit, and the choice between Sorenson and Midwest turns on the qualitative enhancements earned. Sorenson's "integration" proposal is comparatively enhanced with preferences for local residence and past broadcast experience, whereas Midwest is ahead on civic participation. Generally, civic participation has less significance than local residence, *see Radio Jonesboro, Inc.*, 100 FCC 2d at 948 (1985), and Sorenson is also superior on past broadcast experience. Sorenson is thus entitled to an overall slight "integration" preference over Midwest. While Midwest receives a very slight preference for signal coverage, the precedent holds that a slight "integration" preference outweighs a minimal coverage preference. *Northern Sun Corp.*, 100 FCC 2d 889, 895 (Rev. Bd. 1985), *review denied*, FCC 86-135, released March 28, 1986. Consequently, we affirm the ALJ's ultimate conclusion that Sorenson comparatively prevails over Midwest.

18. ACCORDINGLY, IT IS ORDERED, That the application of Ronald Sorenson (File No. BPH-870430MM) for authority to construct a new FM commercial broadcast station on Channel 298C at Des Moines, Iowa IS GRANTED, and the applications of Clear Channel Communications, Inc. (File No. BPH-870430MO), Midwest Radio, Inc. (File No. BPH-870430MQ), Santee Broadcast-

ing, Inc. (File No. BPH-870430MV), Asterisk Broadcasting, Inc. (File No. BPH-870430NB), and High Tower Partnership (File No. BPH-870430ND) ARE DENIED; and

19. IT IS FURTHER ORDERED, That the petition to strike exceptions filed October 30, 1989 by Midwest Radio, Inc. IS DENIED; that the motion to enlarge issues filed October 19, and supplemented October 25, 1989 by, Ronald Sorenson, and the petition for leave to amend, filed October 3, 1989 by High Tower Partnership upon which the motion to enlarge is based, ARE DISMISSED, as moot; that the petition for leave to amend filed October 12, 1989 by High Tower Partnership IS GRANTED, and the amendment IS ACCEPTED; that petitions for leave to amend filed October 12 and December 18, 1989, respectively, by Clear Channel Communications, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and that the petition for leave to amend and to reopen the record filed October 11, 1989 and the petition for leave to amend filed April 27, 1990 by Santee Broadcasting, Inc. ARE GRANTED, and the amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

SEPARATE STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

I submit that Sorenson should receive additional "broadcast experience" enhancements for his operation of "KBLE-FM Cable Radio" over the past fourteen years, entitling him to more than the "advantage" awarded by the majority. *See* para. 12, *supra*.

The record reveals that Sorenson has continuously operated, in essence, a full-service radio station over the Des Moines cable system for a lengthy period of time. Indeed, it appears that the only difference between a "regular" FM broadcast facility and Sorenson's operation was the radiator of the signal; that is, the fully processed audio signal from Sorenson's operation likely was identical to a normal broadcast station, except that upon its exit from an FM exciter the signal entered a cable system rather than an FM transmitter/antenna. In *Tele-Media Corp., supra*, relied upon by the majority, the question concerned the broadcast of locally-originated *television* programs over a cable system by the system's owner, and the court distinguished cable operations from broadcast facilities. Here, however, the issue is simply the *broadcast experience* of Sorenson. I respectfully submit that Sorenson is entitled to a substantial broadcast experience enhancement.

FOOTNOTES

[1] Originally, fourteen applications were designated for consolidated hearing, *see Hearing Designation Order*, 3 FCC Rcd 2887 (1988) (*HDO*), but only the six above-captioned applicants remain in the case.

[2] A petition to strike High Tower Partnership's exceptions, as untimely, was filed by Midwest Radio, Inc. on October 30, 1989. We agree with Midwest that High Tower's exceptions were filed one day late. *See generally Lee Optical and Associated Companies*, 2 FCC Rcd 5480, 5488 n. 1 (Rev. Bd. 1987). However, it does not appear that the other parties were prejudiced by the delay, and the error seems to have been made in good faith. Thus, we will deny the petition to strike.

[3] Participation in station operations by owners ("integration") is considered to be a factor of substantial importance in providing the best practicable service to the public, since it joins legal responsibility and day-to-day performance. *Policy Statement*, 1 FCC 2d at 395. In ascertaining the quantitative "integration" percentage involved, the Commission looks to the percentage of voting ownership that will be "integrated" at the station. *See WHW Enterprises Inc.*, 89 FCC 2d 799, (Rev. Bd. 1982), *review denied*, FCC 83-368 released September 15, 1983, *aff'd in part, reversed in part on other grounds*, 753 F. 2d 1132 (D.C. Cir. 1985); *See also Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8150 (Rev. Bd. 1989).

[4] *See generally Horne Industries, Inc.*, 9 FCC 2d 1193 (Rev. Bd. 1982), *reanded on other grounds*, 53 RR 2d 1647 (1983); *see also* 47 CFR §0.365.

[5] The instant *HDO* indicated that, should any adverse determination be made in the Columbus proceeding respecting Clear Channel's financial qualifications, an appropriate issue would be sought in this proceeding by the Mass Media Bureau. 3 FCC Rcd at 2888. Clear Channel reports that an issue was specified in the Columbus proceeding, and, as a result thereof, it filed a motion for summary decision (in the Columbus proceeding), which was granted. However, merely because that applicant's financial qualifications were scrutinized does not require that similar scrutiny be given to the applicants here. Clear Channel was subjected to the same requirements as its competitors in the Columbus proceeding. To subject every instant party an audit, merely because an applicant was audited elsewhere, would cause a domino effect that would frustrate the Commission's random audit program.

[6] High Tower contends that the ALJ erred in denying an enlargement petition filed by Midwest (on September 7, 1988), seeking a false financial certification issue against Sorenson. *Memorandum Opinion and Order*, FCC 88M-3303, released October 5, 1988 (ALJ). The request for an issue was based on an alleged response elicited from Sorenson during deposition that he was relying on funds from his mother to construct the proposed station, but had not reviewed any documentation concerning her finances prior to certification. However, Sorenson attached his declaration, and one from his mother, to his Opposition to the Petition to Enlarge Issues (filed September 21, 1988), in which both state that he had frequently seen documentary evidence of her assets. She had provided him a financial statement as of March 31, 1987, and he represented he was certain he had reviewed that statement prior to certification. In any event, the ALJ, before ruling, directed Sorenson to make available to Midwest (by October 3, 1988) those documents received from his mother that demonstrated that *she* was financially capable of providing the funds needed to construct the station. *Memorandum Opinion and Order*, FCC 88M-3105, released September 21, 1988 (ALJ). There is no indication in the record that the documents were not made available to Midwest as ordered (certainly, no exception was raised that the docu-

ments were not produced), and indeed the ALJ stated in denying the requested issue on the day *following* the production of documents, "[t]he record shows that Ronald Sorenson had the necessary documents to properly certify that he was financially qualified." *Memorandum Opinion and Order*, FCC 88M-3303. That would seem sufficient. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989) (applicant relying on non-financial institution lender for financial qualifications can prepare and submit such documents after certification, providing the documents show that at the time of certification the lender had sufficient net liquid assets to meet the commitment to the applicant). Thus, we are persuaded that High Tower has not shown a legal basis for disturbing the ALJ's earlier ruling. *See also New Life Evangelistic Center, Inc. v. FCC, supra* (denial of post-hearing inquiry on applicant's financial qualifications affirmed where FCC ruling was adequately supported).

[7] The ALJ rejected Santee's claimed 100% quantitative "integration" credit after concluding that the applicant had not met its burden of proving that its sole surviving stockholder, Henry Everett, would permanently leave South Carolina to fulfill his "integration" pledge. For a discussion of this burden generally, *see Anchor Broadcasting Limited Partnership*, FCC 90R-23, released April 10, 1990. Even assuming *arguendo* that Everett is entitled to the credit he seeks, the applicant could not prevail because Everett's quantitative proposal lacks any FCC-recognized qualitative enhancements.

[8] Midwest is an Iowa corporation with two classes of stock. Eychaner holds 100% of the voting shares as well as some of the non-voting shares. Des Moines Skywave, Inc., a former applicant to this proceeding, holds the remainder of the non-voting shares (6% of the total equity), pursuant to a settlement agreement. *I.D. Findings*, paras. 8-9, and n. 5. As mentioned in note 3, *supra*, however, the Commission looks solely to voting interests of the principals in ascertaining the quantitative ownership that is integrated into station operations. For a more detailed discussion of the "integration" mechanics, *see Metroplex Communications, Inc.*, 4 FCC Rcd at 8150.

[9] The *Policy Statement* similarly explains that local residence is valued because it "indicates a likelihood of continuing knowledge of changing local interests and needs." Moreover, it "complements the statutory scheme and Commission allocations policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests . . . ." 1 FCC 2d at 396.

[10] Sorenson contends that the preference it received should have been "substantial" rather than "moderate," because Eychaner moved from Des Moines to the adjacent community of West Des Moines in 1986. We reject the contention. *See Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 269 (Rev. Bd. 1984) (service area residence occurring within a community continguous to the proposed community of license treated as equal in importance to residence within the proposed community) (subsequent history omitted); *see also Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1096 n. 9 (Rev. Bd. 1982) (same).

[11] Midwest also claims that the ALJ erred in excluding evidence relating to Eychaner's sexual orientation, arguing that homosexuals should be entitled to an enhancement preference similar to those accorded to other minorities that have been subjected to past discrimination. Inasmuch as the Board (and the ALJs) lack authority to create new enhancement categories, we perceive no error on the part of the ALJ. *See Webster Baker Broadcasting Co.*, 100 FCC 2d 616, 619 (Rev. Bd. 1985).

[12] A maximum diffusion of control of the media of mass communications is one of the primary objectives toward which the comparative process is directed. *Policy Statement*, 1 FCC 2d at 394. An applicant currently holding other media interests will not be charged with those interests under this criterion, however, if it pledges by a date certain -- usually on or before the "B" cut-off date (the last day for filing minor amendments as of right) -- to divest itself of those interests. *See Santee Cooper Broadcasting Co. of Hilton Head, Inc.*, 99 FCC 2d 781, 794-795 (Rev. Bd. 1984), *modified sub nom. Womens's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), *aff'd sub nom. Plantation Broadcasting Corp.*, 812 F. 2d 1443 (D.C. Cir. 1987); *see also Barton Broadcasting Co.*, 104 FCC 2d at 788-789.

[13] Under FCC rules, even a full cable system in the same community is not an impermissible conflict with a radio station, and is not proscribed. *See generally* 47 CFR § 73.3555.

[14] Indeed, in the Commission's latest revision of its application form it has indicated that it will no longer credit even "contingent" integration pledges. *Revision of FCC Form 301*, 4 FCC Rcd 3853, 3860 (1989).

[15] Obviously, a significant interest in a large production company (i.e., a network) would carry diversification ramifications. *Cf. Pittsfield Community Television Association*, 94 FCC 2d 1320, 1322 (Rev. Bd. 1983) (stock interest in CBS, Inc. too small to have any meaningful impact on diversification), *review denied*, FCC 84-459, released September 28, 1984; *Angeles Broadcasting Network*, 84-495, released November 26, 1984 (no diversification impact where principal, also consultant to CCN Network, would not duplicate CCN-produced programming on interim facility) (subsequent history omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

CENTURY III CSG-89-111-ML
ORLANDO, FLORIDA, INC.

Application for authority to modify its license for a 6.1-meter Ku-band transmit/receive fixed earth station (Call Sign E890443) at Orlando, Florida to add as points of communication all U.S. domestic satellites, Anik and Morelos systems for the provision of international communications between the United States and Canada and Mexico, and the PAS-1 satellite for service between the United States and all points which PAS is authorized to serve

ALPHA LYRACOM CSG-89-114-ML
d/b/a Pan American
Satellite

Application for authority to modify its fixed 7.0-meter C-band transmit/ receive domestic earth station (Call Sign E890530) at Homestead, Florida for the provision of international services via all U.S. domestic satellites and the Anik and Morelos systems

MEGASTAR, INC. CSG-89-131-ML

Application for authority to modify its license for a fixed 5.5-meter Ku-band transmit/receive earth station (Call Sign E890382) at Woodland Hills, Texas for the provision of international communications via the PAS system between the U.S. and all countries which PAS is authorized to serve and between the U.S. and Mexico via the Morelos system

ATLANTIC SATELLITE CSG-89-132-ML
COMMUNICATIONS,
INC.

Application for authority to modify its license for a 9.2-meter Ku-band transmit/ receive earth Station at Northvale, New Jersey (E-4626) for the provision of international communications via the PAS satellite between the U.S. and those countries which PAS is authorized to serve

SATELLITE CSG-89-155-ML
TRANSMISSION &
RECEPTION
SPECIALIST COMPANY

Application for authority to modify its license for a 9.2-meter fixed C-band transmit/receive earth station at Sylmar California (Call Sign E890790) for the provision of international services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik and Morelos satellite systems

MOBILE SATELLITE CSG-89-160-ML
COMMUNICATIONS, INC. CSG-89-161-ML
d/b/a/ PITTSBURGH
INTERNATIONAL TELEPORT

Application for authority to modify its licenses for two 4.1-meter transportable C-band transmit/receive earth stations (Call Signs E890931 and E890932) for the provision of services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik satellite system

AMERICAN SATELLITE CSG-90-004-ML
COMPANY d/b/a
CONTEL ASC

Application for authority to modify its license for a 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E860593) at Staten Island, New York for the provision of services between the United States and Canada and Mexico via all U.S. domestic satellites

GTE SPACENET CSG-90-007(5)-ML
CORPORATION

Application for authority to modify its licenses for four 7.0 and one 6.1-meter fixed Ku-band transmit/receive earth stations (Call Signs E5027, E4412, E4414, E4413 and E890644) at New York, New York, Chicago, Illinois, Los Angeles, California, Houston, Texas and Minnetonka, Minnesota for the provision of services between the United States and Canada, Mexico, the Caribbean and Latin America via all U.S. domestic satellites

SATELLITE TRANSMISSION AND RECEPTION SPECIALIST — CSG-90-008-P/L

Application for authority to construct and operate a 3.6-meter Ku-band transmit/receive antenna at Houston, Texas for the provision of services between the United States and Mexico via the Morelos satellite system

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT — CSG-90-009-ML

Application for authority to modify its license for a 5.6-meter Ku-band transmit/receive earth station at New Kensington, Pennsylvania (Call Sign E890945) for the provision of services between the United States and those points which PAS has been authorized to serve

RXL COM — CSG-90-010-ML

Application for authority to modify its license for a 9.2-meter fixed C-band transmit/receive earth station at Spokane, Washington (Call Sign E900019) for the provision of services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik and Morelos satellite systems

OVERSEAS TELECOMMUNICATIONS, INC. — CSG-90-018-P/L

Application for authority to construct and operate a 3.5-meter fixed Ku-band transmit/receive earth station at Phoenix, Arizona for the provision of services between the United States and Mexico via the Morelos satellite system

TEXAS INSTRUMENTS, INC. — CSG-90-023-ML

Application for authority to modify its license for a 3.7-meter fixed Ku-band transmit/receive earth station at Mountain View, California (Call Sign E900086) for the provision of services between the United States and Mexico via all U.S. domestic satellites and the Morelos satellite systems

GTE SPACENET CORPORATION — CSG-90-024-ML

Application for authority to modify its license for a 2.4-meter transportable Ku-band transmit/receive earth station (Call Sign E890971) for the provision of services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik and Morelos satellite systems

GTE SPACENET CORPORATION — CSG-90-025-ML

Application for authority to modify its license for 1125 2.4-meter VSAT Ku-band transmit/receive earth stations (Call Sign E890531) for the provision of services between the United States and Canada, Mexico, the Caribbean and Latin American points via all U.S. domestic satellites and via the Anik and Morelos satellite systems for service between the United States and Canada and Mexico, respectively

INTERMEX, INC. — CSG-90-026-P/L

Application for authority to construct and operate a 3.5-meter fixed Ku-band transmit/receive earth station at Dallas, Texas for the provision of private intracorporate services between Dallas, Texas and Mexico via the Morelos satellite system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 11, 1990; **Released: May 21, 199**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title II of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses and construct new earth station facilities, to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. The Commission also has under consideration applications to modify existing earth station licenses to add the PAS-1 satellite as a point of communications to provide service between the United States and points to which Alpha Lyracom (d/b/a/ Pan American Satellite (PAS)) is authorized to serve. These applications were placed on the Commission's public notice. Comments were filed by Communications Satellite Corporation (Comsat) in response to the application of Atlantic Satellite Communications, Inc.

THE APPLICATIONS

2. *Century III Orlando, Florida, Inc. (Century III) (File No. CSG - 89 - 111 - ML).* Century III seeks authority to modify its 6.1-meter Ku-band transmit/receive domestic fixed earth station at Orlando, Florida (Call Sign E890443, File No. 939-DSE-P/L-89) for the provision of transborder communications between the United States and Canada and Mexico via all U.S. domestic satellites as well as the Canadian Anik (C1, C2, C3, D1, D2, E1 and E2) satellites and Morelos systems. Century III also seeks authority to add the PAS-1 satellite as a point of communication for service between the U.S. and all points which PAS is authorized to serve via Ku-band capacity. The technical modifications to the station shall be in accordance with those specified in the application. Century III, in conjunction with Century III Teleproductions, is primarily engaged in the business of commercial video production/post-production work for clients. Century III states that its clients have a need to coordinate, review and distribute to multiple points their materials on a time-sensitive basis. Century III proposes to use the earth station solely for the delivery of video and associated audio. Century III states that no voice or telephony-type service is proposed in connection with these proposed facilities and that the use of these facilities will allow it more efficiently to serve the needs of its clients. With respect to the use of the PAS-1 satellite, Century III states that: 1) it will not provide common carrier service; 2) it plans to enter into a long term lease; and 3) it will not provide service which will be interconnected with the public switched telephone network.

3. *Alpha Lyracom, d / b / a Pan American Satellite (PAS) (File No. CSG - 89 - 114 - ML).* PAS seeks authority to modify the license for its fixed 7.0-meter C-band transmit/receive domestic earth station (Call Sign E890530, File No. 1114-DSE-P/L-89) at Homestead, Florida for the provision of international services via all U.S. domestic satellites and the Anik and Morelos satellite systems. PAS states it will use this facility to provide private, non-common carrier communications on a more efficient and cost-effective basis. There are no technical modifications to the earth station.

4. *Megastar, Inc. (Megastar) (File No. CSG - 89 - 131 - ML).* Megastar seeks authority to modify the license for the eastern most antenna of its fixed 5.5-meter Ku-band transmit/receive domestic earth station (Call Sign E890382, File No. 808-DSE-P/L-89) at Woodland Hills, Texas for the provision of international communications via the PAS system between the U.S. and all countries which PAS is authorized to serve via Ku-band capacity. The technical modifications to the station shall be in accordance with those specified in the application. The requested modification of license would also permit communications between the U.S. and Mexico via the Morelos system. Megastar proposes to serve customers in Mexico with primarily data requirements between the U.S. and Mexico and in some cases the services may be retransmitted via the PAS system to those countries which PAS is authorized to serve. Megastar states it will not provide common carrier service and will not use PAS-1 to carry any public switched traffic. It notes that the subject facilities will provide only video and non-switched data traffic.

5. *Atlantic Satellite Communications, Inc. (ASCI) (File No. CSG - 89 - 132 - M/ L).* ASCI seeks authority to modify the license for its 9.2-meter Ku-band transmit/receive earth station (Call Sign E4626, File No. 1608-DSE-P/L-83) at Northvale, New Jersey for the provision of international communications via the PAS-1 satellite between the U.S. and those countries which PAS is authorized to serve via Ku-band capacity. The technical modifications to the station shall be in accordance with those specified in the application. On September 29, 1989, ASCI filed an amendment to its application changing its request to provide video, voice and data services via the PAS system and to request authority to provide only video and data services to customers abroad. In compliance with the *Separate Systems* decision, ASCI states it will not interconnect with the public switched network.[1] On September 30, 1989,[2] ASCI references its amendment of September 29, 1989 as indication that it will provide only video and data services and will not be interconnected with the public switched message network. ASCI states further that it has contracted with PAS for a "requirements" type contract, for a fixed term of a year, with assurance that services would be provided on an as-needed basis.

6. *Satellite Transmission & Reception Specialist Company (STARS) (File No. CSG - 89 - 155 - ML).* STARS seeks authority to modify its license for a 9.2 meter fixed C-band transmit/receive earth station (Call Sign E890790, File No. 1558-DSE-P/L-89) at Sylmar, California for the provision of international services between the United States and Canada and Mexico via all U.S. domestic satellites and the Anik and Morelos satellite systems. STARS states it is a non-dominant carrier with Section 214 authority for services between the United States and Canada and Mexico and adds that it has previously been authorized to communicate from its earth station in Houston, Texas to points within those countries. STARS states that grant of its instant request will enable it to serve the public more efficiently by providing direct service from Sylmar to Canada and Mexico and creating back-up capabilities at Houston and Sylmar for services between the United States and Canada and Mexico. There are no technical modifications to the earth station.

7. *Mobile Satellite Communications, Inc., d / b / a Pittsburgh International Teleport (MSC) (File Nos. CSG - 89 - 160 - ML, CSG - 89 - 161 - ML and CSG - 90 - 009 - ML).* MSC was formed in 1983 as a domestic, non-dominant common carrier to provide satellite communications services, including video and data services to businesses across the United States. The privately held company has its headquarters in New Kensington, Pennsylvania and is incorporated under the laws of Pennsylvania. MSC states that it currently operates satellite earth station and terrestrial microwave facilities for domestic communications. MSC operates a teleport facility near Pittsburgh, Pennsylvania offering satellite uplink/downlink and associated services for numerous customers. In File Nos. CSG-89-160-ML and CSG-89-161-ML, MSC seeks authority to modify its licenses for two 4.1-meter C-band transmit/receive earth stations (Call Signs E890931 and E890932, File Nos. 1934 and 1935-DSE-P/L-89) to add as points of communication all C-band satellites which have been or will be consulted under Article XIV(d) of the INTELSAT Agreement for the provision of two-way video services between the United States and Canada and Mexico. Specifically, MSC states that it will provide on a "for-hire" basis uplink video distribution and teleconferencing services from remote locations where fixed facilities are not available. MSC adds that it will be

able to serve a growing need of television program producers, television stations and others for instantaneous transmission of programming from the location of live events and remote production locations. The total power into each antenna for both earth stations shall not exceed 300 watts, and other technical parameters remain unchanged as licensed.

8. In application File No. CSG-90-009-ML. MSC seeks authority to modify its license for a 5.6-meter Ku-band transmit/receive earth station at New Kensington, Pennsylvania (Call Sign E890945, File No. 1970-DSE-P/L-89) to communicate with the PAS-1 satellite to provide private, non-common carrier international communications not interconnected with the public-switched message networks between the United States and those points which PAS has been authorized to serve via Ku-band capacity. The technical modifications to the station shall be in accordance with those specified in the application. MSC proposes to provide uplink and downlink services to customers who have entered into long term space segment agreements with PAS for private, international, non-switched communications services offered via the PAS system.

9. *American Satellite Company, d / b / a Contel ASC (Contel) File No. CSG - 90 - 004 - ML).* Contel seeks authority to modify its license for a 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E860593, File No. 971-DSE-P/L-86) at Staten Island, New York to add as points of communication all authorized domestic satellites only for the provision of services between the United States and Canada and Mexico. The technical modifications to the station shall be in accordance with those specified in the application. Contel states that it is in the process of establishing a VSAT network for Deere & Company (Deere) throughout the U.S. and Canada and Mexico. Specifically, Contel states that it will use the earth station to provide a 19.2 Kbps data channel between Moline, Illinois and Monterrey, Mexico as the first link of the VSAT network for Deere. Contel notes that Deere has a major manufacturing operation in Monterrey, which is also the site where some of Deere's financial information is maintained. On the U.S. end, the connection between Moline will be extended to Staten Island, New York using landline facilities pursuant to an interim arrangement. Contel states that the Moline-Staten Island link will continue to be provided via landline facilities until it establishes a hub station in Moline for Deere to communicate directly with Monterrey.

10. *GTE Spacenet Corporation (GTE Spacenet) File Nos. CSG - 90 - 007 (5) - ML, CSG - 90 - 024 - ML and CSG - 90 - 025 - ML).* In File No. CSG-90-007(5)-ML, GTE Spacenet seeks authority to modify its licenses for four 7.0 and one 6.1-meter fixed Ku-band transmit/receive earth stations at New York, New York (Call Sign E5027, File No. 5410-DSE-MP/L-87), Chicago, Illinois (Call Sign E4412, File No. 5581-DSE-MP/L-87), Los Angeles, California (Call Sign E4414, 1398-DSE-MP/L-88), Houston, Texas (Call Sign E4413, File No. 1875-DSE-MP/L-88) and Minnetonka, Minnesota (Call Sign E890644, File No. 1382-DSE-P/L-89) to add all authorized domestic satellites as points of communication for the provision of those transborder services between the United States and Canada, Mexico, the Caribbean and Latin America which have been consulted pursuant to Article XIV(d) of the INTELSAT Agreement. GTE Spacenet states it presently operates these earth stations as shared hub facilities for use in a variety of private network communications that is a part of GTE Spacenet's authorized multi-satellite system to provide a mix of high-speed voice, data and video services. GTE Spacenet states that several of its customers have business requirements which necessitate transborder links to Canada and Mexico and the Caribbean. There are no technical modifications to the earth stations.

11. In application File No. CSG-90-024-ML, GTE Spacenet seeks authority to modify its license for a 2.4-meter transportable Ku-band transmit/receive earth station (Call Sign E890971, File No. 2022-DSE-P/L-89) to establish and operate channels of communication with all domestic satellites which have been or will be consulted under Article XIV(d) of the INTELSAT Agreement to provide data, video or digital voice transmissions, including two-way services, between the U.S. and Canada and Mexico consistent with consultations under Article XIV(d) of the INTELSAT Agreement. GTE Spacenet states this earth station presently is used domestically to support primarily video service requirements at various locations through the United States, as well as Alaska and Hawaii. GTE Spacenet explains that the grant of the requested modification will allow it to meet the needs of its customers necessitating transborder links to Canada and Mexico. There are no technical modifications to the earth station.

12. In application File No. CSG-90-025-ML, GTE Spacenet seeks authority to modify its license for 112 2.4-meter very small aperture terminal (VSAT) fixed Ku-band transmit/receive earth stations (Call Sign E890531 File No. 2282-DSE-P/L-89) to add as points of communication all domestic satellites [3] for the provision of digital data, video and voice transmissions from the U.S. to Canada, Mexico and certain Latin American/Caribbean as well as digital two-way services between the United States and Canada and Mexico consistent with consultations under Article XIV(d) of the INTELSAT Agreement. GTE Spacenet states that it is licensed to operate this network as part of its domestic Skystar Point-to-Point Service, a two-way private channel system supporting high speed digital communication. It notes that the instant request responds to customer requests for transborder links to either Canada, Mexico, the Caribbean or Latin America. There are no technical modifications to the earth stations.

13. *Satellite Transmission and Reception Specialist (Stars) (File No. CSG - 90 - 008 - P / L).* Stars seeks authority to construct and operate a 3.6-meter Ku-band transmit/receive antenna at Houston, Texas for the provision of authorized transborder services between the United States and Mexico via the Morelos system. Stars states it is filing this application on behalf of Banco Nacional de Mexico SNC (Banamex) because Banamex, as an entity of a foreign government, cannot be issued a common carrier earth station license.[4] Stars states it is the operator of the Houston International Teleport, at which Banamex originally intended to locate its earth station. Stars states that it will be in control of and responsible for the operation of the earth station. Stars adds that this station will be used for the private communications of Banamex via the Morelos system between Mexico City and Houston, with terrestrial connections from Houston to New York, New York and other locations.

14. *RXL Com (RXL) (File No. CSG - 90 - 010 - ML).* RXL seeks authority to modify its license for a 9.2-meter fixed C-band transmit/receive earth station at Spokane, Washington (Call Sign E900019, File No. 84-DSE-P/L-9

to add as points of communication all U.S. domestic satellites and the Anik and Morelos satellite systems for the provision of transborder services between the United States and Canada and Mexico. RXL states that the earth station will be used to distribute instructional programming produced by it under contract to Educational Service District 101 and other users and to transmit sports, news and other program material to broadcast television stations and network centers. According to RXL, the earth station will also be able to transmit programming produced by other video program producers in the Spokane area. RXL asserts that because it already provides domestic satellite service to educational institutions, it would be impractical and uneconomical to use the INTELSAT system to extend its services to transborder locations. There are no technical modifications to the earth station.

15. *Overseas Telecommunications, Inc (OTI) (File No. CSG - 90 - 018 - P / L).* OTI, a Delaware corporation with its principal place of business in Alexandria, Virginia, is an international common carrier that has been previously authorized to provide digital private line voice, data and video services and international television service to international points served by INTELSAT. OTI states that it has also been authorized to provide two-way audio, video and business transborder services between the United States and Canada and Mexico. In the instant application, OTI seeks authority to construct and operate a 3.5-meter fixed Ku-band transmit/receive earth station at Phoenix, Arizona to establish digital private line satellite transmissions for the provision of data, video and voice services between points in the United States and Mexico via the Morelos satellite system. OTI states that these facilities will be operated on a common carrier basis.

16. *Texas Instruments, Inc. (TI) (File No. CSG - 90 - 023-ML).* TI seeks authority to modify its license for a 3.7-meter fixed Ku-band transmit/receive earth station at Mountain View, California (Call Sign E900086, File No. 456- DSE-P/L-90) to add as points of communication all U.S. domestic satellites and the Morelos satellite system for the provision of transborder business services between the United States and Mexico. TI states that it will use the facility to communicate between its geographically dispersed facilities in the United States and Mexico for internal company use. There are no technical modifications to the earth station.

17. *Intermex, Inc. (Intermex) (File No. CSG - 90 - 026 - P / L).* Intermex seeks authority to construct and operate a 3.5-meter fixed Ku-band transmit/receive earth station for the provision of private, intracorporate, two-way, point-to-point data business communications services between its Dallas, Texas sales office and its corporate affiliates in Mexico via the Morelos satellite system. Intermex is ultimately controlled by Cydsa, S.A. (Cydsa),[5] a publicly held Mexican corporation engaged in film packaging and chemical products and synthetic products. Intermex states that the Mexican government owns no voting stock interest in Cydsa or its other subsidiaries and that Cydsa is not a Mexican government representative.

DISCUSSION

18. In 1981, following consultations with the Department of State, the Commission conditionally approved the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. Based on these criteria, the Commission has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations. In addition, consultations under Article XIV(d) of the INTELSAT Agreement have been successfully completed for the provision of transborder services to several countries.[6]

19. The subject applications request authority to provide services similar to those previously authorized under the Commission's *Transborder* policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites.

20. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's *Transborder* policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[7] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network.

21. The same considerations also apply to the receive-only video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations for little or no additional cost.[8] The incidental reception of this programming in transborder locations is consistent with the Commission's Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada and Mexico, the Commission has granted applications based on the recognition that these services were traditionally provided by well-developed terrestrial networks and not by INTELSAT.

22. We also note that the applications of Century III, IDB and GTE Spacenet request authority to communicate with the Anik satellite system which includes the Anik E-A and E-B satellites.[9] Although the Anik E-A and E-B satellites have been consulted pursuant to Article XIV(d) of the INTELSAT Agreement, the U.S. Government has had under discussion with Canada the potential use of these satellites as well as the conditions that may be imposed on U.S. carriers/operators seeking to use them. Therefore, this order does not grant final authority for any of the applicants herein to use these satellites. Final authority will be granted only after the applicants have filed with the Commission copies of operating agreements

that would govern the use of these satellites and the Commission determines that such agreements are in the public interest and consistent with the Transborder policy.

23. Further, we find that the applications of Century III (File No. CSG-89-111-ML), Megastar (File No. CSG-89-131-ML), ASCI (File No. CSG-89-132- M/L) and MSC (File No. CSG-90-009-ML) are consistent with the Commission's *Separate Systems* decision which permits the access of the PAS separate satellite system subject to the limitations contained in the *Separate Systems* decision. On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[10] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve subject to the conditions placed on the use of separate systems. In view of these circumstances, we conclude that the grant of these applications is consistent with the Commission's *Separate Systems* policy and will serve the public interest.

24. Accordingly, IT IS ORDERED that the applications of Century III (File No. CSG-89-111-ML), PAS (File No. CSG-89-114-ML), Megastar (File No. CSG-89-131-ML), STARS (File Nos. CSG-89-155-ML and CSG-90-008-P/L), MSC (File Nos. CSG-89-160-ML, CSG-89-161-ML and CSG-90-009-ML), Contel (File No. CSG-90-004-ML), GTE Spacenet (File Nos. CSG-90-007(5)-ML, CSG-90-024-ML and CSG-90-025-ML), RXL (File No. CSG-90-010-ML), OTI (CSG-90-018-P/L), TI (File No. CSG-90-023-ML) and Intermex (File No. CSG-90-026-P/L) ARE GRANTED and the applicants are authorized to modify the licenses for their existing earth station facilities, construct new earth station facilities and/or establish channels of communication to provide the transborder services requested in their applications consistent with Attachments 1 and 2. However, as noted in paragraph 22, *supra*, no final authority is granted herein to communicate with the Anik E-A and E-B satellites. *See* Section 308(c) of the Communications Act.

25. IT IS FURTHER ORDERED that none of the earth stations authorized herein to provide private service shall be used to provide common carrier services[11] and Banamex may not provide common carrier services through the earth station facilities authorized herein to Stars on its behalf.

26. IT IS FURTHER ORDERED that the applications of Century III (File No. CSG-89-111-ML), Megastar (File No. CSG-89-131-ML), ASCI (File No. CSG-89-132-M/L) and MSC (File No. CSG-90-009-ML) ARE GRANTED and the existing earth station licenses of Century III, Megastar, ASCI and MSC are hereby modified to add the PAS-1 satellite as a point of communication for service between the United States and those countries that PAS is now or in the future may be authorized to serve via Ku-band capacity.

27. IT IS FURTHER ORDERED that Century III, Megastar, ASCI and MSC are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

28. IT IS FURTHER ORDERED that the authorizations of Century III, Megastar, ASCI and MSC are subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions place on the operation of separate systems.

29. IT IS FURTHER ORDERED that Century III, Megastar, ASCI and MSC are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

30. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, Stars, OTI and Intermex shall provide the Commission with a summary of equipment which was actually installed.

31. IT IS FURTHER ORDERED that RXL is restricted to transmit in the frequency band of 6185-6425 MHz, and the center frequency 6185 MHz is further restricted to transmit only video modulation in accordance with its frequency coordination.

32. IT IS FURTHER ORDERED that GTE Spacenet shall take extraordinary measures to ensure that the transportable antenna (under call sign E890971 in File No. CSG-90-024-ML) is not operated where human beings could be exposed to high levels of non-ionizing radiation.[12]

33. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

34. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

35. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] ASCI's amendment was in response to Comsat's September 19, 1989, comments stating that ASCI made no representation in its application that it will not interconnect with the public switched network, nor stated what ASCI's lease term would be. According to Comsat, ASCI should certify that it will operate in full compliance with the provisions of the Commission's *Separate Systems* decision.

[2] ASCI states that it was not served with Comsat's filing until September 10, 1989, five days after the closing of the thirty-day comment period. ASCI therefore requests leave to file pleadings out of time. That request is granted.

[3] GTE's request includes the Canadian Anik and Mexican Morelos satellite systems for service between the U.S. and Canada and Mexico.

[4] 47 U.S.C. 310(a) provides that the "station license required under this Act shall not be granted to or held by any foreign government or the representative thereof."

[5] Cydsa is the parent of Reyprint, S.A. de C.V., which is in turn the parent of Consorcio Intermex, S.A. de C.V., which is the parent of Intermex.

[6] *See* Attachments 1 and 2.

[7] Satellite Business Systems, 88 FCC 2d 195 (1981).

[8] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[9] Century III refers to these satellites as Anik E1 and E2.

[10] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 8649 (1989). PAS is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom.

[11] This restriction does not apply to the earth station license modification of OTI, since OTI will operate the earth station on a common carrier basis and has previously received authorization to provide common carrier services between the U.S. and Canada and Mexico.

[12] In application File No. CSG-89-024-ML, GTE Spacenet has submitted a new radiation hazard study which lowers its maximum power into the 2.4-meter transportable dish, to 198.6 watts. The gain of the antenna is 48.8 dBi, thus limiting the maximum effective isotropic radiated power of this facility to 71.8 dBW. However, the near field power density on the main beam axis of the antenna is 12.29 mW/cm2 which exceeds the safety standard of 5 mW/cm2. The transportable antenna center height will be 2.9 meters and the bottom of the dish will only be 1.7 meters above the ground. It is possible for the vehicle to park and operate where human beings could be exposed to the main beam. Therefore, GTE Spacenet shall take extraordinary measures to ensure that the transportable antenna is not operated where human beings could reasonably be exposed to high levels of non-ionizing radiation. Examples are: very close to other cars or trucks in a parking lot where persons could stand on top of a car or in the back of a truck, next to a ramp or hillside, or near an apartment building. GTE Spacenet states that signs will be posted to alert people, but there are situations where signs may not be sufficient and the operator must take the precautions.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S) .
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 5)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

4) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

5) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO COMMUNICATIONS AUTHORITY — File No. I-T-C-90-047

Application for authority to acquire and operate facilities for the provision of packet switching service between Puerto Rico and Costa Rica.

ORDER AND AUTHORIZATION

Adopted: May 14, 1990; Released: May 22, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 17, 1990 by Puerto Rico Communications Authority (PRCA), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for the provision of packet switching service between Puerto Rico and Costa Rica and beyond. The application was placed on public notice of January 31, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-047 IS GRANTED, and PRCA is authorized to:

a. acquire from AT&T on an Indefeasible Right of User (IRU) basis, one voice-grade half-circuit in the AT&T microwave system between San Juan, Puerto Rico and Magens Bay, St. Thomas, U.S. Virgin Islands;

b. lease from AT&T a one-half interest in and operate one voice-grade circuit in the St. Thomas-3 cable between St. Thomas, U.S. Virgin Islands and Vero Beach, Florida;

c. lease and operate necessary connecting facilities between the cablehead in Vero Beach, Florida and the Roaring Creek earth station;

d. lease from Comsat and operate one voice-grade satellite circuit between the Roaring Creek, Pennsylvania earth station and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Costa Rica, furnished by PRCA's correspondent in Costa Rica;

e. lease from AT&T and operate one voice-grade circuit in the Roaring Creek earth station; and

f. use said facilities to provide packet switching service between Puerto Rico and Costa Rica and points beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between PRCA and its correspondent in Costa Rica and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-230

In re Applications of

JOSEPHINE BROADCASTING LIMITED PARTNERSHIP (hereafter: Josephine)	File No. BPH-880309MD
NORTH COAST BROADCASTING COMPANY, INC. (hereafter: North)	File No. BPH-880310MC
GMT BROADCASTING, INC. (hereafter: GMT)	File No. BPH-880310MP
VECTOR BROADCAST GROUP (hereafter: Vector)	File No. BPH-880310MQ
GARY M. JOSEPH (hereafter: Joseph)	File No. BPH-880310MV
PENINSULA BROADCASTING CORP. (hereafter: Peninsula)	File No. BPH-880310MX
Ben Wiley and Dorothy Smith d/b/a EBONY PARTNERSHIP (hereafter: Ebony)	File No. BPH-880310MY
S & S COMMUNICATIONS (hereafter: S&S)	File No. BPH-880310NE
CASCIANI COMMUNICATIONS, INC. (hereafter: Casciani)	File No. BPH-880310NP
THE MOODY BIBLE INSTITUTE OF CHICAGO (hereafter: Moody)	File No. BPED-880310OB

For Construction Permit for a
New FM Station on Channel 234A,
Erie, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: April 18, 1990; Released: May 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* Josephine's application was returned as unacceptable for filing by the Chief, FM Branch, on June 2, 1989, due to an apparent discrepancy in the antenna height above average terrain (HAAT) value. Josephine filed a Petition for Reconsideration ("Petition") on June 27, 1989; Peninsula filed an Informal Opposition to Petition for Reconsideration and Acceptance for Filing ("Opposition") on September 19, 1989;[2] and Josephine filed its Reply to Informal Opposition to Petition for Reconsideration and Acceptance for Filing ("Reply") on September 29, 1989. By letter dated February 2, 1990, the Chief, FM Branch, granted Josephine's Petition for Reconsideration and reinstated its application *nunc pro tunc*, finding that, upon re-examination of the application, the apparent discrepancy could be resolved and the HAAT value confidently and reliably determined from the four corners of the application as originally filed. The letter noted that Peninsula's Opposition to Josephine's Petition would be considered during the proper petition period pursuant to 47 C.F.R. § 73.3573(f)(2). Accordingly, Peninsula's pleading will be considered herein.

3. Peninsula first argues that Josephine's Petition is procedurally defective because it is not in compliance with 47 C.F.R. § 1.106 as it does not: (1) contain any new or novel arguments not previously considered by the Commission; (2) present facts or arguments which appear to justify a change in Commission policy; or (3) request reconsideration of orders designating cases for hearing pursuant to 47 C.F.R. § 0.283(14)(ii)(b)(2). We disagree. The reasons listed by Peninsula are not the only permissible grounds on which to base a petition for reconsideration. Pursuant to Section 1.106(d)(2), errors in the Commission's findings of fact or conclusions of law are also valid bases. Thus, Josephine's Petition is in full compliance with the procedural requirements of Section 1.106. Peninsula then argues that Josephine's Petition must fail on the merits since it merely attempts to clarify the ambiguity found by the Commission in the application, and that it cannot confidently and reliably be determined which HAAT value is correct. We disagree. As we stated in our reinstatement letter, upon re-examination of the application, we found that the apparent discrepancy in the HAAT values could be confidently and reliably resolved by utilizing only the information in the application as originally filed. Peninsula also claims that Josephine's failure to serve Peninsula with its Petition is a violation of the Commission's *ex parte* rules, citing 47 C.F.R. § 1.1208(c)(1)(i)(C), and contends that should Josephine be reinstated, a special issue going to Josephine's character should be specified at the time of designation. While it is true that the instant proceeding is restricted,

and that Section 1.106(f) requires service of the petition for reconsideration upon parties to the proceeding, we find that there is no evidence that Josephine intentionally violated the rules or that the failure of service prejudiced the outcome in any way. Thus, we do not find it either necessary or appropriate to specify a character issue against Josephine. Accordingly, having found Peninsula's arguments to be without merit, its Opposition will be denied herein.

4. *North*. Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. Staff investigation reveals that North failed to report that the application for consent to assign WAST(AM), Ashtabula, Ohio (BAL-860312EQ), to Ronald G. Seggi, the President and a Director of North, was dismissed on March 1, 1989. Accordingly, within 30 days of the release of this Order, North will be required to submit an amendment to the presiding Administrative Law Judge completely and accurately updating its application as required by Section 1.65.

5. *Site Availability Certification*. On June 23, 1988, GMT filed an amendment prior to the close of the filing window proposing to relocate its transmitter site and to change the antenna height above average terrain and the effective radiated power. GMT did not include a new certification of site availability with its amendment. On July 26, 1988, Ebony filed a motion to return GMT's application. Ebony claims that GMT's omission of a new certification of site availability rendered its application as amended insufficient for tender and thus must result in its return. On August 5, 1988, GMT filed an opposition to Ebony's motion to return GMT's application, along with a new site availability certification. However, GMT contends that a new certification is not required and that its old certification applies with equal force to its new site. We have reviewed the situation and find that neither party's interpretation is correct.

6. The tenderability requirements are set forth in Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936, 19945-46 (1985), *recon. denied* 50 Fed. Reg. 43,157 (1985) (" *Report and Order* "). They apply only to applications, not to amendments. As the Commission stated in *The Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892, 7893 (1989):

> The tenderability component of the "hard look" standard is intended to detect and eliminate *applications* which at the *initial* stage of processing, contain fundamental errors in key portions therein . . . . Subsequent amendments are not required to conform to the tenderability requirements. Nothing in the letter or spirit of the *Report and Order* [in MM Docket 84-750, *supra*] suggests that its requirements should be so extended.

(Emphasis in original.) In *Taber Broadcasting*, the Commission, *inter alia*, upheld the Mass Media Bureau's view that a late-filed, incomplete *amendment* to an underlying application in compliance with the tenderability criteria may be corrected by subsequent amendment. We are extending that principle here to timely filed, incomplete amendments to applications which, as originally filed, meet the tenderability requirements. Thus, in the instant case, while GMT's transmitter site change amendment should have been accompanied by a new certification of site availability, because the old certification does not apply with equal force to the new site, omission of the site availability certification will not result in the return of its application which, as originally filed, meets all tenderability criteria. Rather, GMT will be required to amend its application to provide a new site availability certification. Although we would normally direct that the amendment be submitted to the presiding Administrative Law Judge within 30 days of release of the Order, for administrative convenience, we will accept the new site certification GMT filed with its opposition.

7. *Coordinate Discrepancy*. North proposes to locate on the existing tower of TV station WSEE(TV). North lists the geographic coordinates of the site in FCC Form 301 (October 1986), Section V-B, Item 2(b), Figures 1 and 2 as 42^0 02' *20* " NL, 80^0 03' 4 *5* " WL. However, the coordinates determined from Figure 2 (transmitter site map) are 42^0 02' *17* " NL, 80^0 03' 4 *4* " WL. Since the tower is an existing tower, the coordinate discrepancy does not affect the acceptability of North's application. However, within 30 days of the release of this Order, North will be required to submit an amendment to the presiding Administrative Law Judge resolving its coordinate discrepancy.

8. *Tower Height Discrepancies*. North and Moody propose to locate on the existing tower of TV station WSEE(TV). Both North and Moody list the overall tower height above ground level (OHAGL) and overall tower height above mean sea level (OHAMSL) as 229 meters and 637 meters, respectively. These are the same values WSEE(TV) lists for the tower heights. However, Commission records show the OHAGL and OHAMSL as 231.7 meters and 640.1 meters, respectively. Casciani proposes to locate on the existing tower of FM station WXKC. Casciani lists the OHAMSL as 514 meters. However, Commission records show the OHAMSL as 514.5 meters, which rounds to 515 meters. Since the applicants propose to locate on existing towers, the tower height discrepancies do not affect the acceptability of North's, Casciani's or Moody's application. However, North, Casciani and Moody will be required to either file an amendment correcting the tower heights listed in their respective applications, or submit documentation to establish that the heights specified are, in fact, correct and that the Commission's and the FAA's records are in error. Additionally, an air hazard issue will be specified below pending resolution of the discrepancy.

9. *Late - filed Amendments*. The following applicants have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
North	November 16, 1988
GMT	August 5, 1988
Peninsula	October 7, 1988
S&S	July 24, 1989
Casciani	February 6, 1989
Moody	August 9, 1988

10. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. *Air Hazard*. As indicated in paragraph 8, above, the tower heights listed by North, Casciani and Moody do not agree with the heights shown in Commission and FAA records. Accordingly, an air hazard issue will be specified against North, Casciani and Moody pending resolution of the discrepancies and the FAA made a party to the proceeding.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by North, Casciani and Moody would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That Peninsula's Informal Opposition to Petition for Reconsideration and Acceptance for Filing IS HEREBY DENIED.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, North will be required to submit an amendment completely and accurately updating its application as required by 47 C.F.R. § 1.65 to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That within 30 days of release of this Order, North shall submit an amendment resolving its coordinate discrepancy to the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That within 30 days of release of this Order, North and Moody shall each submit an amendment resolving their tower height discrepancies to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by North, GMT Peninsula, S&S, Casciani and Moody ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Sima Birach (ARN-880310NA) was dismissed on June 2, 1989 at the applicant's request.

[2] Peninsula claims it was unable to file a timely Opposition because it was not served with the Petition for Reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-218

In re Applications of

RC COMMUNICATION, INC. (hereafter "RC")	File No. BPH-880226MX
CLAUDIA HARDEN (hereafter "Harden")	File No. BPH-880229MC
BERNARD G. PEREZ (hereafter "Perez")	File No. BPH-880229NK
ISIS BROADCAST GROUP (hereafter "Isis")	File No. BPH-880301MG
JOELMART, INC. (hereafter "Joelmart")	File No. BPH-880301MJ
BUFFALO BROADCASTING, INC. (hereafter "Buffalo")	File No. BPH-880301MM
ALMA BROADCASTING, A LIMITED PARTNERSHIP (hereafter "Alma")	File No. BPH-880301MN
Katherine Ann Marriott d/b/a PACIFIC RIM BROADCASTING, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "Rim")	File No. BPH-880301MS
MANDORLA, INC. (hereafter "Mandorla")	File No. BPH-880301MV
GREAT SCOTT BROADCASTING, A LIMITED PARTNERSHIP (hereafter "Scott")	File No. BPH-880301MX
GRAZIANO BROADCASTING COMPANY (hereafter "Broadcasting")	File No. BPH-880301NA
PATRICIA WHEELER WODLINGER (hereafter "Wodlinger")	File No. BPH-880301ND
GERALD STERNBERG AND GEORGE KOUTOULAS, A GENERAL PARTNERSHIP (hereafter "SK")	File No. BPH-880301NE
CHANEL BROADCASTING (hereafter "Chanel")	File No. BPH-880301NH
MISSION PACIFICA CORPORATION (hereafter "Mission")	File No. BPH-880301NI
LETTA BROADCASTING, INC. (hereafter "Letta")	File No. BPH-880301NK
SHAROL WALEN SIEMENS d/b/a SANTA BARBARA FM LIMITED PARTNERSHIP (hereafter "FM Limited")	File No. BPH-880301NL
P & T COMMUNICATIONS (hereafter "P & T")	File No. BPH-880301NO
SANTA BARBARA COMMUNICATIONS, INC. (hereafter "SCBI")	File No. BPH-880301NR
FELL-MITCHELL LIMITED PARTNERSHIP (hereafter "Fell")	File No. BPH-880301NS
DEBORAH LYNN SCZUDLO (hereafter "Sczudlo")	File No. BPH-880301OA
YING HUA BENNS (hereafter "Benns")	File No. BPH-880301OE

SUSAN LUNDBORG (hereafter "Lundborg") File No. BPH-880301OK

DELTA BROADCASTING, INC. (hereafter "Delta") File No. BPH-880301OL

LOEW BROADCASTING OF CALIFORNIA, INC. (hereafter "Loew") File No. BPH-880301PB

MICHAEL SALVADOR GONZALEZ (hereafter "Gonzalez") File No. BPH-880301PC

For Construction Permit for a New FM Station on 299B1 (107.7 MHz) in Santa Barbara, California

HEARING DESIGNATION ORDER

Adopted: April 11, 1990; Released: May 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

Isis

2. Exhibit 1 of Isis's application states that principal Shirley G. Kennedy "holds a non-attributable limited partnership interest in Coast TV, an applicant for UHF television station channel 38 in Santa Barbara, California. File No. BPCT-840720KG, MM Dkt. 84-934." Isis indicates that if the Commission "at any point determine[s] that this limited partnership interest is attributable, Ms. Kennedy will divest herself of such interest if and when this application is granted." While 47 C.F.R. § 73.3555(b)(2) prohibits the granting of an FM license if the predicted 1 mV/m contour encompasses the entire community of license of the proposed TV station, the Commission excepts UHF facilities from this requirement, stating that "such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." *Section 73. 3555*, at note 4. In an abundance of caution, we will order that, in the event of grant of Isis's application *and* a determination that Ms. Kennedy's interest in the UHF television application is attributable, Shirley Kennedy must divest herself of all interest in Coast TV prior to the commencement of the FM station's program test authority.

Buffalo

3. In its August 23, 1988 amendment, Buffalo stated that the Federal Aviation Administration notified it that the radiofrequency levels at Buffalo's proposed 25 kilowatts effective radiated power ("ERP") would present a hazard to air navigation, specifically as a result of desensitization of aircraft receivers using a localizer frequency 2.6 MHz above the applicant's frequency. After much consideration, the FAA eventually indicated that its concerns would be satisfied if Buffalo specified an ERP of 14 kilowatts and use of an 8-bay 1/2 wavelength antenna with five degrees of mechanical beam toward the FAA's affected facilities. Buffalo's application, however, lists the ERP in the horizontal plane and that due to beam tilt as 14 kilowatts, and does not indicate in its vertical elevation plot of the radiated field (Exhibit 9) a mechanical beam tilt despite noting that it would be used. Accordingly, Buffalo will be required to submit the appropriate amendment to the presiding Administrative Law Judge.

Mandorla

4. Information before the Commission indicates that Mandorla was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Mandorla's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against Mandorla in this proceeding.

5. Item 5(b) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application which has been dismissed with prejudice by the Commission." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. While Mandorla in-

dicated that shareholders Kent E. Smith and Linda Y. Askey were limited partners in applications filed to serve, respectively, Rocky Mount, North Carolina (File No. BPH-870430MF) and Nolanville, Texas (File No. BPH-870827MZ), it did not note that both applications were subsequently dismissed with prejudice.[1] Accordingly, an appropriate issue will be specified below.

Broadcasting

6. John Graziano, Broadcasting's president, is also vice president of RSB Communications, Inc., a principal of the licensee of FM Station KMGQ (Goleta, California). Grant of Broadcasting's application would create a potential duopoly problem, which would in turn violate the Commission's multiple ownership rules. Mr. Graziano has indicated his intent to terminate his relationship with KMGQ (FM) the event of grant of the referenced application. Accordingly, in the event of grant of Broadcasting's application, Mr. Graziano will be required to sever all connections with KMGQ prior to the commencement of program test authority.

Chanel

7. The geographical coordinates listed in Section V-B, Item 2 of Chanel's October 13, 1989 amendment are 34 degrees- *20* minutes-12 seconds North Latitude/119 degrees-51 minutes-03 seconds West Longitude. However, the geographical coordinates of the transmitter site as plotted on the site map (Figure 2 of the amendment) are 34 degrees- *30* minutes-12 seconds North Latitude/119 degrees-51 minutes-03 seconds West Longitude. The latter set of coordinates is also listed on the copy of FAA Form 7460-1 submitted with Chanel's November 22, 1989 amendment. Therefore, drawing on the application as a whole, the correct coordinates can be confidently and reliably determined to be 34-degrees- *30* minutes-12 seconds North Latitude/119 degrees-51 minutes-03 seconds West Longitude. Accordingly, the applicant must amend its application to correct the apparent typographical error contained in Section V-B, Item 2 of its October 13, 1989 amendment.

Mission

8. Since the engineering data submitted in its application did not clearly demonstrate that Mission provided a 3.16 mV/m signal to the entire proposed city of license, as required by 47 C.F.R. § 73.315(a), Mission requested waiver of the rules. The FM Branch policy in this regard is that no waiver is required unless the proposed principal city contour falls below 80% of the residential area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985); *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Our study reveals that Mission's 3.16 mV/m contour covers approximately 98% of the community of Santa Barbara. Therefore, waiver of the rules is not required and Mission's request will be dismissed.

Other Matters

9. *Technical Discrepancies*. Upon review of the data contained on the coverage contour maps provided in response to Section V-B, Item 16 and the associated information in Item 19 regarding the predicted distances to the 3.16 and 1 mV/m contours, discrepancies have been found in seven of the captioned applications. Accordingly, the applicants listed below will be required to file corrective amendments with the presiding Administrative Law Judge.

Applicant	Deficiency
Rim	Distances on contour coverage map along the 90 and 270-degree radials are shorter than those listed in Item 19.
Scott	Predicted distances along 270-degree (27.9 and 48.4 kM) and 315-degree radial (19.1 and 33 kM) are incorrect. Commission study reveals these distances to be 18.9/33.1 km (270-degree radial) and 23.4/40.8 kM (315-degree radial)
Wodlinger	Lists the assumed value of 30-meters as the HAAT for the 0, 45 and 315-degree radials. While this value is used to calculate the distances to the required contours, the true HAAT along each of the eight radials is required to calculate the applicant's average HAAT.[2]
Letta	The predicted coverage contours on the applicant's contour map do not match the values listed in Item 19, which our study confirms as correct.
P & T	Lists height of radiation center above average elevation for the 45-degree radial as minus 231.4 meters. Additional data within the application lists this figure as minus 281.4 meters, a figure which could produce the HAAT specified in Item 7(b)(3). Further, P & T failed to list the radial through its principal community and the associated information regarding the antenna height above radiation center above average elevation for this radial and predicted (3.16 and 1 mV/m) contours.
Benns	Distances displayed along the 115-degree radial on contour coverage map are shorter than those listed in Item 19

10. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and 13 of the above-captioned applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Harden, Rim, Mandorla, Mission, Letta, FM Limited, P & T, Fell, Sczudlo, Benns, Lundborg, Loew and Gonzalez would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. While P & T indicated its intent to employ five or more fulltime employees, it failed to provide the required statement. Although SCBI and Lundborg submitted the required statements, neither listed a readily identifiable women's organization to utilize for employee recruitment purposes. Accordingly, each will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

12. *Section II, Item 4*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Mandorla, Scott and SK did not complete this item correctly. Mandorla provided only the post office box address for shareholders T.A. Ramsey and J.E. Tillman. Similarly, Scott provided the post office box address for principal Elmer S. Friedberg. Scott also failed to list the specific street address for Faye Scott and provided no address for Harold Litvin. Finally, SK's November 29, 1988 amendment changed the residential address for principal George Koutoulas but listed it only as a post office box. Each applicant will, therefore, be required to submit corrective amendments to the presiding Administrative Law Judge.

13. *Late - filed Amendments*. Isis, Buffalo, Alma, Wodlinger, SK, Chanel, Letta and Delta petitioned for leave to amend their applications after June 6, 1988, the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522 (a)(2) and, consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES FILED [3]
Isis	October 13, 1988
Buffalo	August 23, 1988
Alma	December 13, 1988; February 16, 1989
Wodlinger	February 28, 1989
SK	September 29, 1988
Chanel	October 13, 1989
Letta	March 22, 1989
Delta	September 27, 1988

14. Isis, Buffalo, Alma, Rim, Mandorla, Broadcasting, Wodlinger, SK, and Fell petitioned for leave to amend their applications after June 6, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES FILED
Isis	June 16, 1988
Buffalo	February 8, 1989
Alma	October 31, 1988; January 25, 1989
Rim	March 14, 1989
Mandorla	December 12 and 29, 1988; May 17, 1989
Broadcasting	November 22, 1988
Wodlinger	December 21, 1988
SK	November 29, 1988
Fell	August 30, September 1, 1988; March 27, April 17, 1989
Benns	January 4, 1989

15. *Area and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to Mandorla's application.

2. To determine whether Mandorla's organizational structure is a sham.

3. To determine whether Mandorla violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the dismissal with prejudice of applications in which one or more of its partners had an ownership interest.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Mandorla possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Harden, Rim, Mandorla, Mission, Letta, FM Limited, P & T, Fell, Sczudlo, Benns, Lundborg, Loew and Gonzalez would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That, in the event of grant of Isis's application and a finding that her limited partnership interest in UHF Channel 38 applicant Coast TV is attributable, Shirley G. Kennedy will be ordered to divest herself of all interests in and sever all connections with Coast TV prior to the commencement of program test authority.

19. IT IS FURTHER ORDERED, That Buffalo submit the appropriate amendment regarding its effective radiated power, as detailed in paragraph 3 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That, in the event of grant of Broadcasting's application, John Graziano will be ordered to divest himself of all interests in and sever all connections with FM Station KMGQ prior to the commencement of program test authority.

21. IT IS FURTHER ORDERED, That Chanel must submit an amendment correcting its listed coordinates, as noted in paragraph 7 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. §73.315 filed by Mission IS DISMISSED AS MOOT.

23. IT IS FURTHER ORDERED, That Rim, Scott, Wodlinger, Letta, P & T and Benns submit amendments concerning the technical discrepancies involving their predicted signal strength contours, as detailed in paragraph 9 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, P & T, SCBI and Lundborg shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

26. IT IS FURTHER ORDERED, That Mandorla, Scott and SK shall submit amendments containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

27. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Isis, Buffalo, Alma, Rim, Mandorla, Broadcasting, Wodlinger, SK, Chanel, Letta, Fell, Delta and Benns ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *See Radio Triangle East Company*, FCC 89M-2375 (released September 29, 1989 and *Oliver Kelley and Mary Ann Kelley*, FCC 89M-2287 (released September 18, 1989).

[2] In pertinent part, 47 C.F.R. § 73.313(e) states that "[i]n directions where the terrain is such that antenna heights less than 30 meters for the 3 to 16 kilometer sector are obtained, an assumed height of 30 meters must be used for the prediction of coverage."

[3] All amendments listed in this paragraph are engineering amendments.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-440

In re Applications of

McCLENAHAN BROADCASTING, INC.	File No. BPH-870429MI
SPECTRUM BROADCASTING CORP.	File No. BPH-870430MB
COMMUNICATION AUDIO VIDEO CORPORATION	File No. BPH-870430MJ

For a Construction Permit for a New FM Station on Channel 298A in Charlottesville, Virginia

Appearances

Richard J. Bodorff and *Jonathan W. Emord*, on behalf of McClenahan Broadcasting, Inc.; *Katrine Renouf*, on behalf of Spectrum Broadcasting Corp.; *Bruce A. Eisen*, on behalf of Communication Audio Video Corporation; and *Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 11, 1990; Released: May 22, 1990

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 53 Fed. Reg. 38060, released September 29, 1988, the Chief, Audio Services Division, designated for a comparative hearing the captioned applications of McClenahan Broadcasting Incorporated (McClenahan), Spectrum Broadcasting Corp. (Spectrum), and Communication Audio Video Corporation (CAVC).[1] The following issues were specified with regard to the remaining applicants:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.[2]

2. By *Memorandum Opinion and Order*, FCC 89M-1039, released April 3, 1989, the Presiding Judge added the following issues against CAVC:

1. To determine whether Communication Audio Video Corporation falsely certified to its financial qualifications;

2. To determine whether Communication Audio Video Corporation (CAVC) committed acts of misrepresentation or lack of candor when during the course of the deposition of CAVC President, Treasurer, Director and Sole Voting Shareholder John M. Brown, he testified that between July of 1987 and October of 1988, Messrs. Lindsay R. Barnes and Robert M. Callaghan were non-voting stockholders in and were financial supporters of CAVC.

3. To determine whether Communication Audio Video Corporation (CAVC) violated Section 1.65 of the Commission's Rules by failing to amend its application in a timely manner to report that it lacked sufficient liquid assets on hand or available from commited sources to construct and operate its proposed facility for three months without revenue.

4. To determine the effect resolution of the foregoing issues will have on Communication Audio Video Corporation's basic qualifications to be a Commission licensee.[3]

3. A prehearing conference was held in Washington, D.C. on December 8, 1988. Hearing sessions were held on May 8 - May 9, 1989 and on May 17 - May 19, 1989 and June 22, 1989. The record was closed on the latter date. *See Order*, FCC 89M-1728, released June 26, 1989. Findings of fact and conclusions were filed September 18, 1989 and replies were filed October 3, 1989.

4. By *Order*, FCC 89M-440, released September 1, 1989, the Presiding Officer added the following issues against CAVC.

To determine whether Communication Audio Video Corporation is financially qualified to be a Commission licensee.

To determine, in light of the evidence adduced with respect to the foregoing issue, whether Communication Audio Video Corporation possesses the requisite basic qualifications to be a Commission licensee.

5. Hearing sessions were held on October 24 and 25, 1989. The record was reclosed at the conclusion of the hearing session on October 25, 1989. *See Order*, FCC 89M-2550, released October 27, 1989. Supplemental findings of fact and conclusions were filed November 22, 1989; replies were filed December 4, 1989.

FINDINGS OF FACT

Comparative Issue

McClenahan Broadcasting, Inc. (McClenahan)

Background

6. McClenahan Broadcasting, Inc. is a corporation organized under the laws of Virginia. McClenahan was incorporated on November 15, 1984 (MBI Ex. 1; Spectrum Ex. 5). W. Edward McClenahan is the President and a Director of McClenahan. He also owns 51% of McClenahan stock, which is voting stock. His wife, Donna M. McClenahan, is the Vice-President, Assistant Secretary and a Director of McClenahan. She owns 49% of

McClenahan stock, which is voting stock. McClenahan has only one class of stock, voting stock (Tr. 205). Their daughter, Kathleen McClenahan Ring, is the Secretary-Treasurer and a Director of McClenahan but she holds no stock in McClenahan. No other person has ever been an officer, director, or shareholder of McClenahan (MBI Ex. 1).

7. In early 1986, Mr. McClenahan informed Mrs. McClenahan that the Charlottesville channel would become available and asked her if she would want to join him in filing for the channel (Tr. 93; 198). Because of the McClenahan's association with the Charlottesville community and Mrs. McClenahan's association with the business people in the city of Charlottesville, the two decided that they should file and that they should both be stockholders in a corporate applicant (Tr. 198). Sometime prior to April 1, 1987, the McClenahans consulted with their local corporate counsel, a Mr. Russell, who was informed to make the necessary changes in McClenahan's corporate structure to include Mrs. McClenahan. They also may have consulted with their communications counsel at this time (Tr. 200).

8. Mr. and Mrs. McClenahan received a blank copy of FCC Form 301 from McClenahan's attorneys (Tr. 99). Mr. McClenahan created a rough draft of the application (Tr. 99; 190). He conferred with Mrs. McClenahan concerning the application responses (Tr. 99; 190). Mrs. McClenahan agreed with Mr. McClenahan's draft answers (Tr. 144). Mr. McClenahan initially consulted with McClenahan's engineer and conferred with Mrs. McClenahan concerning these matters to seek her approval (Tr. 191). Mr. McClenahan drafted responses to the Model EEO program form, but Mrs. McClenahan reviewed his long hand draft. Mr. McClenahan discussed with Mrs. McClenahan the application exhibit sections that he physically drafted and she concurred with his draft responses (Tr. 193-194). Mr. and Mrs. McClenahan had extensive discussions concerning their program statement draft (Tr. 195). Mr. McClenahan made arrangements for McClenahan's technical proposal. Mrs. McClenahan was familiar with these arrangements and agreed with Mr. McClenahan's decisions as to these arrangements (Tr. 215). Mr. McClenahan obtained a transmitter site for the applicant. Mrs. McClenahan was aware of the site location, saw the site and was in agreement with Mr. McClenahan's selection of it (Tr. 216). Mr. McClenahan assembled the applicant's financial proposal. Mrs. McClenahan reviewed the proposal and agreed with it (Tr. 216). Mr. McClenahan drafted the applicant's budget. Mrs. McClenahan reviewed the budget and agreed with Mr. McClenahan's figures (Tr. 216).

9. Mrs. McClenahan discussed application procedures with FCC counsel to McClenahan (Tr. 110). In particular, she discussed "the various things that could or could not happen and how long it would take." She also asked that FCC counsel keep her apprised of "exactly what was going on" (Tr. 113). Mrs. McClenahan prepared a rough draft to her husband of matters pertaining to her for inclusion in McClenahan's draft integration and diversification statement (Tr. 120; 304). The draft integration and diversification statement prepared by Mr. and Mrs. McClenahan was prepared for the benefit of their FCC counsel who, in turn, relied upon that statement and conversations with the McClenahans to prepare the integration and diversification statement actually filed with the Commission (Tr. 163-164; 167; 168-171).

Integration

10. *W. Edward McClenahan* intends to divest himself from any other business interests with which he is now or may in the future be associated in order to carry out his full-time, 40 hours per week commitment to the station as its General Manager. In that capacity, he will oversee the day to day operations of the station, develop station policies and be responsible for hiring and firing all station personel (MBI Ex. 2, p. 1).

11. Mr. McClenahan has resided within the proposed station's 70 dbu contour since 1970 (McClenahan Ex. 2, p. 2).

12. Mr. McClenahan was a member of the Charlottesville-Albermarle Chamber of Commerce from 1970-1982. From 1971-1975 he was a Member of the American Red Cross Charlottesville Chapter, serving as Publicity Director for two years and Divisional Chairman of the Fund Raising Committee in 1974 and 1975 (McClenahan Ex. 2, p. 2).

13. From 1971-1980 he served as a member of the Albermarle County Rotary Club, chairing several committees. From 1972-1974 he was a Member of the Fund Raising and Publicity Committee of the Charlottesville/Albermarle Rescue Squad and from 1972-1975, he was a Board Member of the Charlottesville Chapter United Way, serving on that organization's Executive Committee in 1974 and 1975 (MBI Ex., 2, pp. 3-4).

14. From 1972-1974, Mr. McClenahan served as a Member of the Board of Directors and as Division Director of the March of Dimes/Charlottesville/Albermarle County. During these years, he also chaired the Publicity Committee (MBT Ex. 2, pp. 4-5).

15. From 1979-1981, Mr. McClenahan served as a member of the Fund Raising and Publicity Committee of the Western Albermarle Rescue Squad and, in 1980, additionally served as Chairman of the Fund Raising and Publicity Committee of that organization. In 1988, he served the Charlottesville Chapter of SCORE (Service Corp of Retired Executive), a business organization sponsored by the United States Small Business Administration. He did so by providing free business counseling to owners of small businesses (MBI Ex. 2, pp. 5-6).

16. From 1953-1954, Mr. McClenahan worked full-time as Sales Manager for the licensee of Stations KCRG(AM)/TV at Cedar Rapids, Iowa. From 1954-1957 he worked full-time as General Manager for the licensee of Stations KCRG(AM)/TV Cedar Rapids, Iowa, supervising about 47 station employees. From 1957-1958 he worked full time as Sales Manager for the licensee of Station WITI-TV at Milwaukee, Wisconsin and, from approximately 1958-1960, served as President of the licensee of Station KWEB(AM) at Rochester, Minnesota, simultaneously working full-time as General Manager of the station (MBI Ex. 3, p. 1).

17. From approximately 1960-1962, Mr. McClenahan served as President of Don-Lo Broadcasting, Inc., licensee of Station KHAK(AM) and FM at Cedar Rapids, Iowa. There he worked full-time as General Manager, supervising construction of the station as well as managing the station's operations (MBI Ex. 2, p. 7-8).

18. From 1962-1963, Mr. McClenahan worked for Triangle Publications, Inc., licensee of Stations KFRE(AM) and FM at Fresno, California and from 1966-1969, he worked for Triangle Publications, Inc., licensee of Station WFIL(AM) at Philadelphia, Pennsylvania. From

1962-1963, he worked full-time as General Manager of KFRE(AM) and FM and from 1966-1969, he worked full-time as Station Manager of Station WFIL(AM). From 1963-1966, he worked as Central Division Sales Manager, Triangle Publications, Inc. Syndicated Program Sales Offices headquartered in Chicago, Illinois. He was responsible for selling syndicated programming to radio and television stations throughout the midwest and securing sponsorship for syndicated programming (MBI Ex. 2, p. 8-9).

19. From 1970-1974, Mr. McClenahan served as Executive Vice President of Evans Communications, Inc., licensee of Stations WCHV(AM) AND WCCV(FM) at Charlottesville, Virginia, simultaneously working full-time as General Manager. From 1974-1981, he served as President and a director of McClenahan Broadcasting Corporation, licensee of Stations WPED(AM) and (from 1979-1981) WCMZ(FM), Crozet, Virginia. He worked as General Manager of the stations (MBI Ex. 2, p. 9).

20. From 1981-present, Mr. McClenahan has worked for his own business, W. Edward McClenahan and Associates, Inc., doing media brokerage work and broadcast consulting and appraising (MBI Ex. 2, pp. 9-10).

21. *Donna M. McClenahan*, W. Edward McClenanhan's wife, will work full-time, a minimum of 40 hours per week, at the proposed FM station as Operations Director, responsible for coordinating operations policies among the various station departments and supervising the staff involved with station sales, budgeting, purchasing, bookkeeping, traffic, production, and financial planning (MBI Ex. 3, p. 1; Tr. 137-140, 315). She intends to withdraw entirely from all her connections with any business with which she is now or may in the future be associated in order to fulfill her integration commitment (MBI Ex. 3, p. 1).

22. Mrs. McClenahan has lived within the 70 dbu contour of the proposed station since 1970 (MBI Ex. 3, pp. 1-2).

23. Mrs. McClenahan has been involved in a number of civic organizations with activities concerning the community of Charlottesville. From 1978 to the present, she has volunteered her time in developing community service activities at the Charity Fair and Art Show. From 1978 through about 1980 or 1981, she has participated in presentations to children hospitalized in Charlottesville area hospitals (MBI Ex. 3, p. 2).

24. From 1981-1984, Mrs. McClenahan served as the Chair of the Publicity Committee for the Charlottesville/Albermarle Cancer Award. During the year 1982, she served on the Board of Directors of the Cancer Board and personally directed efforts to raise funds to purchase public awareness literature concerning cancer for dissemination to the people of Charlottesville. In 1988, Mrs. McClenahan provided assistance to the Heart Research Unit Wing of the University of Virginia Hospital, assisting the organization in public relations efforts designed to raise funds to pay for the construction of the Heart Research Wing (MBI Ex. 3, pp. 3-4).

25. From 1958-1960, Mrs. McClenahan worked full-time as Office Manager, part-time copywriter, sales person and Continuity Director at Station WKEB(AM), Rochester, Minnesota. From 1960-1962, she was Vice President and Treasurer of Don-Lo Broadcasting, licensee of Station KHAK(AM) and FM at Cedar Rapids, Iowa, working full-time as Office Manager, copywriter, and Continuity Director. From 1970-1974, she worked part-time as a sales consultant for Stations WCHV(AM)/WCZV(FM) at Charlottesville, putting together on-air promotions for the stations. From 1974-1981, she did sales work on a part-time basis at Station WCMZ(FM) at Crozet, Virginia (MBI Ex. 3, pp. 4-5).

Diversification

26. Neither McClenahan Broadcasting, Inc. nor any of its officers, directors, or shareholders owns any interest in any medium of mass communications (MBI Ex. 4).

Auxiliary Power

27. McClenahan will install auxiliary power sufficient to keep its proposed station in operation in the event of a power failure (MBI Ex. 5).

Spectrum Broadcasting Corp. (Spectrum)

Background

28. Spectrum is a Virginia corporation whose stock is held as follows (Spectrum Ex. 1):

Stockholder/ Office	# of Shares		% Ownership Represented	
	Voting	Non-Voting	Voting	Equity
Deborah M. Royster President/ Director	105	284	51.2	35.8
Alicia B. Lugo Treasurer/ Director	50		24.4	4.6
Henry K. Truzy, Jr. Secretary/ Director	50		24.4	4.6
George Bates		149		13.7
Thomas A. Jackson		149		13.7
John E. Thomasson		149		13.7
Leroy Washington		149		13.7

29. Ms. Royster, then an attorney with Reed, Smith, Shaw & McClay including Pierson, Ball & Dowd, with experience in communications law practice and representation of clients in comparative broadcast hearings,[4] first became aware of the availability of the channel while at work in her law firm office sometime in 1984 or 1985 (Tr. 355-356; 362). She was involved with a broadcast matter at the time and was doing work in the communications area when she became apprised of the channel's prospective availability (Tr. 362). Ms. Royster recalls that

the window opened for the channel sometime in February or March of 1987 (Tr. 364). When the window opened, Ms. Royster contacted a Mr. George Bates (a prospective non-voting stockholder in the applicant) and asked him if he knew people involved in radio in Charlottesville who wanted to work in radio and if he could help her identify investors (Tr. 374). She also informed him that she was interested in finding people who lived in Charlottesville and who knew the community (Tr. 375; 379). It was Ms. Royster's intention to establish a minority-owned radio station (Tr. 379).

30. Of the three voting stockholders, Ms. Royster has been the principal most involved in the preparation and prosecution of Spectrum's application. Ms. Royster contacted and retained Spectrum's legal and engineering counsel (Tr. 366, 370). Neither Ms. Lugo nor Mr. Truzy were principals at that time (Tr. 370). Ms. Royster also decided that the organizational structure for the applicant would be a corporation (Tr. 365). The Articles of Incorporation and By-laws were prepared under her direction (Tr. 426). Also, at Ms. Royster's request, corporate counsel drafted stock subscription agreements for the principals (Tr. 457-458).

31. Ms. Royster drafted the applicant's budget, although budget items were discussed with Ms. Lugo and Mr. Truzy (Tr. 380-381). Ms. Lugo provided an estimate on Charlottesville office space and Mr. Truzy provided input with respect to the equipment specifications in the budget (Tr. 380-381). Ms. Royster was solely responsible for obtaining the bank reasonable assurance letter which Spectrum relies on (Tr. 382-383, 410-412). Mr. Royster drafted the final FCC Form 301 for the applicant (Tr. 386-387). Ms. Royster drafted the programming statement after discussing it with Mr. Truzy (Tr. 422, 550). Ms. Royster and Ms. Lugo developed the station's EEO program together (Tr. 423).

32. The total investment of Ms. Lugo and Mr. Truzy is $500 each for their 50 shares of voting stock which was paid in full a short time prior to the hearing. Ms. Lugo and Mr. Truzy are not required to furnish additional funds (Tr. 406, 407, 433-434). Ms. Royster is responsible for about 40% of prosecution expenses. The other non-voting stockholders are responsible for the remaining 60% (Tr. 434).

33. Ms. Royster has been handling the financial aspects of the corporation (Tr. 442). Ms. Royster has not decided whether she will pay for her stock in cash or in services (Tr. 463). Ms. Royster received her voting stock in exchange for $500 cash and for services valued at $550 for her role as an "incorporator, promoter, officer and attorney" (Tr. 464). Ms. Royster received her non-voting stock in exchange for services valued at $2,300 (Tr. 465). Ms. Royster explained at the hearing that during the incorporation process, she was "the promoter" (Tr. 448; 464).

34. Within a month or two of the application filing, Ms. Royster established a bank account for the corporation. Ms. Royster opened the account in Industrial Bank of Washington, D.C. Ms. Royster does some of her personal banking at this bank (Tr. 421; 539). Although Ms. Lugo is the treasurer of the corporation and is a signatory with Ms. Royster on the corporate bank account, Ms. Lugo has not signed any checks written on the account (Tr. 502). Only Ms. Royster has signed such checks (Tr. 422).

Integration

35. Deborah M. Royster, Spectrum's 51.2 percent voting stockholder, will serve as the station's General Manager with responsibility for overall management of the station and supervision of its personnel. She will establish and implement station policies and procedures and coordinate the various departments, whose heads will report directly to her. Ms. Royster is a Black female who practices law in Washington, D.C., but will relinquish all other employment and business interests. In the event of a grant, she will move to Charlottesville, where she spent her law school years from 1979-1981 and work full-time, at least 40 hours per week at the station. In 1976, while attending college, Royster worked for six months as a news assistant at television station Channel 5 in Washington, D.C. Ms. Royster worked 10-15 hours a week as an intern and received college credit (Spectrum Ex. 3, p. 1; Tr. 479-480).

36. Alicia B. Lugo is a 24.4 percent voting stockholder who will serve as the proposed station's Public Affairs Director and act as liaison to area community leaders and groups and to the public. She will also coordinate the station's public affairs and public service programming activities, including the determination of relevant issues and problems to be addressed in the station's public affairs programming and other public service efforts. Ms. Lugo, a graduate of Hampton Institute and a life-long Charlottesville resident, is Project Director of Teen Site, a social service program for teenage mothers and pregnant teens, sponsored by Focus, a women's resource center serving clients in Charlottesville and the surrounding area. In the event of a grant, she will relinquish all other employment and business interests to work at the station full-time, at least 40 hours per week (Spectrum Ex. 3, pp. 1-2).

37. Ms. Lugo is a Black female who has the following past and present civic activities in the Charlottesville area: (a) Charlottesville School Board 1976-1986, Vice Chairman for four years, Chairman for the last five years of tenure; (b) Piedmont Virginia Community College Board, 1973-1977, Vice President; (c) Charlottesville-Albermarle Technical Education Center, 1976-1978, 1984-1986, Chairman, Vice Chairman; (d) Charlottesville Electoral Board, 1986-present, Vice Chairman, formally Secretary; (e) Legal Aid and Lawyer Referral Board of Directors, 1971-1973, Chairman; (f) Charlottesville Social Development Commission, 1982-1984; (g) Region X Health and Retardation Services Board of Directors, 1973-1976; (h) Executive Directors Association, OIC's of America, 1971-1986; (i) OIC's of Virginia, Inc. 1971-1986, Charter Member and Secretary; (j) YMCA Board of Directors, 1975-1977; (k) Central Virginia Economic Development Commission Board of Directors, 1975-1977; (l) Monticello Area Community Action Agency Board of Directors, 1975-1977; (m) Charlottesville Women's Policital Forum Women of the Year, 1978; (n) Martin Luther King Humanitarian Award of the Interfaith Ministerial Alliance of Charlottesville, 1988; (o) First Baptist Church, Charlottesville Clerk, 1988, Sunday School teacher; (p) Charlottesville AIDS Support Group, 1989-present; (q) ESSA Advisory Board, Charlottesville Public Schools, 1974-1977; (r) Citizens Action Committee for Criminal Justice, 1977, Chairman, Task Force on Employment Needs of Offenders; (s) Citizens Task Force on Crime, Education Subcommittee, 1975, Co-Chair; (t) Health Services Steering Committee for Regional Health Services

Administration, 1974-1975; (u) University of Virginia Center for Liberal Arts Institute on Fine Arts and Public Education, 1986; (v) Area V Manpower Planning Council of the Governor's Manpower Planning Council and the Piedmont Job Training Administration, 1971-1985; (w) Finer Womanhood Award, University of Virginia Chapter, Zeta Phi Beta Sorority, 1985; (x) Humanitarian Award of Bethany Seven Day Adventist Church, Woman of the Year, 1985; (y) Charlottesville Human Resources Assembly, 1971-1975; (z) League of Women Voters, 1974-1975; (aa) FOCUS, a women's resource center, 1976; (bb) Charlottesville NAACP, 1966-present; (cc) Board of Directors, Charlottesville, Albermarle Child Care Association, 1988-present; (dd) National, State and Local School Board's Association, 1976-1988; (ee) National Virginia and Charlottesville Education Association, 1967-1969; (ff) National and Virginia Employment and Training Association, 1971-1985 (Spectrum Ex. 3, pp. 2-4).

38. Henry Karl Truzy, Jr. is a 24.4 percent voting stockholder who will serve as the proposed station's Program Director establishing the station's program format and policies and supervising on-air personnel. A Charlottesville resident since 1984, Mr. Truzy will leave his position as announcer, Music Director and Night Program Director at Station WINA-WQMZ Charlottesville in the event of a grant to work full-time, at least 40 hours per week at the station.

39. Truzy is a Black male. In addition to his present job, which he has held since 1984, Truzy's broadcast experience includes the position of Music Director and Program Director at Station WOKN, Goldsboro, North Carolina, where he worked from the time he left college until assumption of his present duties. Mr. Truzy's civic activities since coming to Charlottesville have largely involved working with children. He is active in the New Line Baptist Church, where he plays guitar for the Children's Choir. He has spoken for the Charlottesville MACCA in conjunction with job core and training; he provided the music for the 1987 Boy Scouts Annual Fund Raiser; and he has an on-going relationship with the Burley Middle School, where he judges the annual Talent Show and speaks to the students on such topics as staying in school, drugs and positive self image. Since 1985, Mr. Truzy has been the coordinator of the local NAACP's Black History Month program "Moments in Black History", which involves four minute formatted pieces on Black leaders produced and co-written by Mr. Truzy for broadcast use (Spectrum Ex. 3, pp. 4-6).

Diversification

40. Neither Spectrum Broadcasting Corporation nor any of its stockholders has any interest in any medium of mass communications (Spectrum Ex. 2).

Auxiliary Power

41. Spectrum proposes installation of an auxiliary transmitter and an auxiliary generator to ensure continued operation in the event of electric power loss (Spectrum Ex. 4).

Communication Audio Video Corporation (CAVC)

Background

42. John M. Brown is the sole voting shareholder in CAVC (CAVC Ex. 1). CAVC is a Virginia corporation. Mr. Brown has 51% of the equity in CAVC (CAVC Ex. 1). Mr. James L. Jessup has 49% of the equity in the corporation (Tr. 1043).[5]

43. Brown originally met with Jessup concerning the application in May of 1987 to discuss whether or not he was interested in participating as a stockholder (Tr. 1016). No agreement with Jessup was entered into at that time because Jessup had other business matters in which he was involved (Tr. 1017-1019). Brown and Jessup had several subsequent meetings because Mr. Jessup, who is affiliated with the Central Virginia Pepsi Cola Bottling Company, did business with CAVC's audio service company (Tr. 1024). However, Brown and Jessup did not discuss the radio application again until May of 1989 (Tr. 1023-1024). Jessup received his 49% interest in return for his capital contribution and financial commitment to CAVC discussed *infra* under the financial issue added against CAVC.

Integration

44. Mr. Brown proposes to devote his full-time (at least 40 hours per week) as General Manager of the FM broadcast station. In this capacity, his duties will consist of the supervision of all management employees at the station. He will have primary responsibility for planning and executing all major decisions and for setting station policy (CAVC Ex. 1, p. 3).

45. At the time of filing, CAVC, founded by Mr. Brown in 1983, was the owner of a cable programming service which ceased operations in September 1988 (CAVC Ex. 1; pp. 2-3). John Brown presently operates a residential and commercial building repair and remodeling company and owns Octagon Corp., which presently manages three properties in Charlottesville (Tr. 1052-1053). In the event of a grant, Mr. Brown will divest both interests, to which he presently devotes 5-10 hours a week (Tr. 1052-1054).

46. Brown was born July 15, 1955 in Charlottesville, Virginia, and has been a life-long resident of that community. He is a Black male and has the following civic/charitable affiliations within his proposed station's service area: (a) Member, City of Charlottesville Community Development Block Grant Task Force, June 1986-present; (b) Member, Charlottesville-Albermarle Jaycees, 1985-present; (c) Member, First Night Virginia Committee, Charlottesville, 1986; (d) Member, Minority Business Association Task Force, Charlottesville, 1987; (e) Assisted the University of Virginia, Afro-American Affairs Cultural Center in producing and coordinating Black History Month 1986; (f) Member of Board, Opportunity Industrialized Centers, Charlottesville, 1984-1987; (g) Member, Cable Explorers Club, Boy Scouts of America, Charlottesville, Virginia, 1971-1974; (h) Volunteer musician for various churches in Charlottesville and Albermarle County, 1968-1976; (i) Member, Holy Temple Church of God and Christ, Charlottesville, 1955-present; (j) Talent Show Judge, 4-H Club of Charlottesville-Albermarle County, 1985; (k) Advisor on Black History Month, Lane High School of Charlottesville, Virginia, 1970 (CAVC Ex. 1, pp. 1-2).

Diversification

47. CAVC's cable programming business was the subject of a timely divestiture commitment. Form 301, Ex. 3. The applicant reports no other media interest held by CAVC or any of its stockholders.

Basic Qualifications - CAVC

False Certification Issue

48. In January of 1987, Brown had already determined what he needed to finance the CAVC application (Tr. 730). Brown estimated a need for $100,000 to construct and operate his proposed station for three months without revenue (Tr. 682).[6] Brown also understood the meaning of the term "net liquid assets" as used by the Commission. He has testified unequivocally that " . . . net liquid assets refers to--defines stocks or certificates, either readily available or that can be easily converted to cash in a short period of time" (Tr. 732). Brown was aware that he had to certify on the application that CAVC was financially qualified. He had also discussed with his communications counsel the kind of commitment he would have to have in order to certify (Tr. 733).

49. At the time of the filing of the CAVC application, Brown relied upon two Charlottesville lawyers, Lindsay R. Barnes and Robert M. Callaghan to provide the financial support necessary to certify to CAVC's application (Tr. 679, 711). Barnes first became apprised of Brown's interest in filing for the Charlottesville channel via a telephone call he received from Brown on a weekend day in April 1987 (Tr. 563).[7] Two to three days after the weekend telephone conversation with Brown, Brown brought his proposal "Communications Audio Video Corporation Proposal to Operate an FM Radio Station in Charlottesville, Virginia", (MBI Ex. 14), to Barnes' office (Tr. 565, 737, 752).

50. Page 4 of the proposal, which Brown admits he drafted, reads as follows:

> CAVC Corp proposes to fund this venture in the following manner: Individuals who agree to guarantee a loan for CAV Corp (herein referred to as "Guarantors") shall place _____ dollars in one-year Certificates of Deposit with _____ Bank, upon approval of CAV Corp's application for a license to operate an FM station in Charlottesville, Virginia. CAV Corp shall then apply for a loan at _____ Bank, with Guarantors offering their Certificates of Deposit as security for said loan.
>
> One (1) year after the loan is received by CAV Corp, CAV Corp shall pay back the loan with interest owed. Upon repayment of the loan and maturity of the C.D.'s, Guarantors are free to withdraw their funds from _____ Banks.
>
> In consideration for the Guarantors securing the loan for CAV Corp, CAV Corp promises to pay each Guarantor an amount equal to twenty percent (20%) for the amount which they placed in one-year C.D. as security for said loan. Payment of the twenty percent (20%) shall be made one (1) year after the payment of the loan.

MBI Exh. 14.

51. After first being presented with Brown's proposal, MBI Ex. 14, Barnes dictated a Memorandum of Understanding, which is MBI Ex. 16. That understanding bears signature lines for Brown and Barnes and not for Callaghan. The unexecuted Memorandum of Understanding contemplates the creation of a guarantor fund to be supplied with a total amount of $100,000 from an unspecified group of investors including Barnes. The Memorandum of Understanding reads in pertinent part:

> This Memorandum of understanding executed this 30th day of April, 1987 by and between John M. Brown, Sr. (hereinafter referred to as Stockholder) and Lindsay R. Barnes, Jr. (hereinafter referred to as Guarantor).
>
> WHEREAS Stockholder is a principal in Communications Audio Video Corporation, an applicant for a Class A FM broadcast license in Charlottesville, Virginia; and
>
> WHEREAS Guarantor is an individual, acting on behalf of himself and other investing individuals, who expects to provide up to [the last three words are inserted via penned interlineation] $100,000 for use, if required, upon initiation of station operation; and
>
> WHEREAS Stockholder and Guarantor recognize that those contributing to the guaranteed monetary fund may, in the event of management mistakes or misfeasance, lose all of their contributions to such fund.
>
> NOW THEREFORE, for value received, the Stockholder hereby agrees that, in the event of depletion of the guaranteed monetary fund of $100,000 [the last two words are inserted via penned interlineation] during the first three months after commercial station operation [the last seven words are inserted via penned interlineation] by Stockholder and Communication Audio Video Corporation, Stockholder hereby grants to Guarantor [sic], acting on behalf of himself and other contributors to the guaranteed monetary fund, the right to purchase Stockholder's stock holdings in the operating corporation for the fair market value of such holdings. Stockholder and Guarantor [sic] agree that such option may not be invoked until such time as such invocation will not cause the Federal Communications Commission to rescind the Class A FM license or construction permit sought by Stockholder, the operating corporation, and the investors in the guaranteed monetary fund. Stockholder agrees not to transfer or encumber any stock holdings in the applicant corporation without prior written approval of Guarantor . . . .

MBI Ex. 16.

52. The memorandum was, to quote Barnes, "never executed, and it was a memorandum which I believe, quite obviously after it was prepared; I had reservations about it because I believed it talked about a guaranteed fund" (Tr. 579-580). Barnes decided not to execute the memorandum, as he put it, "because I didn't want to pledge monetary assets or lock up liquid assets for a long period of time or what could be a long period of time"

(Tr. 590). Barnes testified that he told Brown before April 30, 1987 that he did not want to pledge his monetary assets or lock up his liquid assets for a long period of time (Tr. 590). Brown testified that he did not recall why the document was not executed (Tr. 773).

53. Barnes also dictated a Consent of Directors, which is MBI Ex. 17, which reads in pertinent part:

> RESOLVED, that, in return for (a) the provision of $5000.00 working capital for use in connection with the April, 1987 Class A FM application with the Federal Communications Commission, (b) the provision of legal advice to the corporation in the interim period between the filing of the Class A application and designation hearing before the Administrative Law Judge, and (c) the commitment to provide a guarantor fund of $100,000.00 to the corporation in order to satisfy FCC requirements for three-month solvency without advertising revenue, the corporation will issue to Lindsay R. Barnes, Jr., Robert M. Callaghan and such other individuals, not to exceed five in number, as may be approved by the Board certificates of preferred stock evidencing a 49% equity participation in the corporation.
>
> BE IT FURTHER RESOLVED that, in the past preferred shareholders do not participate on an equal equity basis as common shareholders, the corporation and John M. Brown, Sr. (by his signature hereto) agree to issue such 49% equity share to the above referenced individuals in such common stock/preferred stock percentages as may be appropriate and at such time (but in no event later than receipt by the corporation/applicant of an FCC construction permit) as may, in the opinion of the corporation's FCC attorney, be dictated by the FCC's integrated ownership guidelines.

MBI Ex. 17.

54. Barnes did not execute the unexecuted Consent of Directors because he "expressed to Mr. Brown [his] reservations about setting aside those cash or liquid assets," referring to the monetary fund called for in the unexecuted Memorandum of Understanding (Tr. 592). Callaghan never saw the unexecuted Memorandum of Understanding before his deposition in this proceeding (Tr. 663).

55. On the morning of April 30, 1987, Barnes gave Brown a letter dated April 30, 1987, which is the specific commitment of financing agreed to by Barnes and Callaghan (Tr. 680; MBI Ex. 15). Unlike the unexecuted memorandum of understanding (MBI Ex. 16), the executed letter agreement (MBI Ex. 15) does not provide for a guaranteed monetary fund. Subsection C provides, instead, that Barnes and Callaghan guarantee the repayment of borrowed funds in the case of a default. That letter reads in pertinent part:

> . . . .Pursuant to terms set forth below, we hereby subscribe to purchase a 49% equity participation in the corporation through the preferred stock shares presently held in the corporation's treasury.
>
> As consideration for such purchase, we hereby propose to provide the following: (a) $5,000 in loan monies for use by the corporation and its principals in filing a Class A FM broadcast application, for a Charlottesville allocation, with the Federal Communications Commission, (b) excepting any practice of communications law (a specialty not practiced by the undersigned), various legal and counseling services for the applicant corporation and its principals during the period of time between the April 30, 1987 application filing date and the designation hearing by the appropriate Administrative Law Judge, and (c) conditioned upon the applicant corporation's receipt of a construction permit from the FCC, service as guarantors for an amount (not to exceed the sum of $100,000.00) to be available to address any defaults by the corporation in servicing its financial commitments in the first three months of on-air operation.
>
> As an additional term, we hereby propose that, in the event that the guarantors are made liable for debts of the corporation upon its default, they shall have the right of first refusal to purchase (for appraised value) the common, voting stock in the corporation presently held solely by John M. Brown, Sr. 1980 shares of such stock are presently held by John M. Brown, Sr., and it is proposed that, in return for the above consideration, (a) the corporation issue no further shares of common stock without the written consent of the guarantors and (b) John M. Brown, Sr. not sell, transfer, dispose of, or otherwise encumber his 1980 shares without written consent of the undersigned guarantors.
>
> Given the amount of common, voting stock outstanding, it would appear that the issuance pursuant to this subscription offer would encompass 1902 [the number provided by penned interlineation] shares ([1980 + 0.49). Of course, should other shares of common stock be issued, the equity participation of the undersigned would be adjusted according to such 49% participation formula. Acceptance of this subscription offer will result in the issuance of 951 shares of preferred, non-voting stock to each of the undersigned . . . .

MBI Ex. 15.

56. On the witness stand, Brown admitted that the letter of April 30, 1987 was the *only written agreement* entered into by Messrs. Barnes and Callaghan and CAVC (Tr. 688). In the executed Consent of Directors, the Board of Directors of CAVC adopted by unanimous consent the offer set forth by Messrs. Barnes and Callaghan in the letter of April 30, 1987 (MBI Ex. 18; Tr. 681).

57. Brown received the letter of April 30, 1987 for the first time on the morning of April 30, 1987. He received the executed Consent of Directors at that time, but he didn't sign the executed Consent of Directors in Barnes' office because he wanted his communications counsel to look it over (Tr. 723). Brown remained in Barnes' law office for about thirty minutes that morning (Tr. 883). He testified that during this thirty minute period the only thing that preoccupied him was the April 30, 1987 letter; additionally, he did inform Barnes that he would have to have his communications counsel review it, but according to Brown he said nothing else (Tr. 883).

58. Brown claimed he was unaware that the April 30 letter agreement contained different terms from the Unexecuted Memorandum of Understanding until he reviewed the Presiding Judge's Order of April 3, 1989, adding the issues in this proceeding (Tr. 891-892). Brown stated that in his own review of the letter on the morning of April 30, 1987 (the filing date) he noticed that the equity percentage he expected Barnes and Callaghan to have, i.e., 40%, had been changed to 49% (Tr. 884). Brown admitted that at the time he agreed to the April 30, 1987 letter on the morning of April 30, 1987, he had no other alternative but to accept it in order to meet the deadline for filing his application in this proceeding, which counsel have stipulated was in fact that very day (Tr. 374).

59. Brown testified that the only executed document produced by Barnes and Callaghan, the April 30, 1987 letter, was not executed until after it was shown to CAVC's communications counsel (Tr. 687). Brown testified that he pointed out to his communications counsel that the 49% equity provision constituted a change from the parties' earlier agreement. He said that his communications counsel did not comment about the letter at all (Tr. 886; 890; 907). Brown testified that although he provided the letter to his communications counsel to review before he executed it, his counsel only discussed with him that part of the letter concerning 49% equity and "didn't discuss the other part," i.e., Subsection C (Tr. 689). Brown said that on May 4 or 5, 1987, he showed the April 30, 1987 letter to George Dygert, his corporate counsel (Tr. 887). Dygert purportedly read over the letter, however, according to Brown, Dygert, too, did not mention Subsection C of this letter (Tr. 887-888; 890; 903). Brown also testified that he did not tell his corporate counsel that he wanted to get out of the arrangement specified in the April 30, 1987 letter (Tr. 735; 888).

60. Brown recalled that "on the morning [the April 30, 1987 letter] was given to [Brown], [he] briefly read over it . . . " (Tr. 687). Brown next testified that he, Brown, "scanned the document" and that "the one thing that stood out of the document was the 49 percent equity participation" but not "Subsection C" [the part of the document containing the following language: "conditioned upon the applicant corporation's receipt of a construction permit from the FCC, service as guarantors for an amount (not to exceed the sum of $100,000.00) to be available to address any defaults by the corporation in servicing its financial commitments in the first three months of on-air operation."] (Tr. 688-689). Brown stated that upon his initial reading of the April 30, 1987 letter, he at that time did not notice that the executed letter was different from the previously prepared but unexecuted Memorandum of Understanding (Tr. 695). Nonetheless, Brown admits that he expected that his commitment with Barnes would be evidenced by a writing in the same form as the April 30, 1987 letter (Tr. 879).

61. Brown also claimed that upon each occasion when he reviewed the letter of April 30, 1987, he avoided reviewing Subsection C of that letter. Brown testified that at the time he signed CAVC's consent of directors adopting the April 30, 1987 letter he did not notice Subsection C of the April 30, 1987 letter (Tr. 697). Brown testified that he discussed the April 30, 1987 letter with his communications counsel on April 30, 1987 before the CAVC application was filed (Tr. 743). He said that he recalls staying in communications counsel's office for about 4 and one-half to five hours that day (Tr. 904). Brown also testified that this same counsel reviewed the April 30, 1987 letter. However, Brown "[t]o the best of [his] recollection, your Honor" was not informed by counsel that there existed a difference between the unexecuted Memorandum of Understanding and the April 30, 1987 letter both of which were in the possession of his counsel (Tr. 697). Brown testified that although he presented his corporate counsel with the letter and reviewed it at that time, he, Brown, did not notice a difference between Subsection C and what he understood the nature of Messrs. Barnes and Callaghan's commitment to be (Tr. 887).

62. Brown testified that he signed the consent of directors adopting the April 30, 1987 letter even though he was unhappy with the 49% equity provision which he thought was an equity interest in excess of 40%, the amount to which he said he had agreed to provide Messrs. Barnes and Callaghan (Tr. 726; 755).

63. Brown stated that he did not become aware of Subsection C until he "saw your [Honor's] order in reference to the issues" [i.e., not until April 3, 1989] (Tr. 689). Only at that point, testified Brown, did he go "back and [look] at the specific detail in reference to the $100,000 that is committed in this letter" (Tr. 689). Under further cross-examination, however, Brown testified that he did in fact notice the part of Subsection C pertaining to the condition specified there on the very morning of April 30, 1987. Stated Brown: "I went over the document in a scan that morning. When I got to Washington counsel's office, I pointed out the 49 percent wasn't what we agreed to. I didn't have any choice in the situation. As far as the specifics of that paragraph was concerned, *I saw the conditioned upon issuance of a construction permit, $ 100, 000.* and went on to the rest of the letter. I didn't specifically focus on what was being said." (emphasis added.)

64. Brown also testified that although he looked at the April 30, 1987 letter in December of 1988 in preparation for his deposition and although he looked at it again when he saw it attached to the McClenahan Motion to Enlarge of January 19, 1989, he did not see any difference in it and the original unexecuted Memorandum of Understanding (Tr. 746-747). Brown maintained that this did not change his view that the funds would be made directly available to him (Tr. 748-749). According to Brown, the fact that the April 30, 1987 latter contains different terms from the unexecuted Memorandum of Understanding came as a "complete surprise" to him, a surprise which first struck him at the time he first reviewed the Order of April 3, 1989, adding the issues in this proceeding (Tr. 891-892).

65. Brown also claimed ignorance of the meaning of the term "guarantors" although he specifically used that term in his CAVC proposal (MBI Ex. 14). Brown testified that although he understood the term "guarantors" in MBI Ex. 14 to have its common definitional meaning in the context of his proposal, he understood there to be a different meaning for the term in the April 30, 1987 letter agreement (MBI Ex. 15). Thus, Brown understood "guarantors" in his proposal to mean individuals who guarantee a loan to CAVC. However, with respect to the April 30 letter agreement he defined "guarantors" as "it meant that I could rely on to provide the net liquid assets to construct the facility" (Tr. 753).

66. Brown first testified that Barnes told him that Messrs. Barnes and Callaghan's commitment consisted of a "guarantee" (Tr. 686). He then testified that by "guar-

antee" he understood Barnes to mean a direct commitment of funds to the applicant (Tr. 685-687). Brown also initially testified that the funding would be contingent upon a grant of the CAVC construction permit application. Brown admitted, however, that this "commitment" was not evidenced by a writing (Tr. 702).

67. Under further cross-examination, Brown testified contrary to his earlier statement that Barnes told him Messrs. Barnes and Callaghan would fund the application. Brown now testified that he could not recall if Barnes made a commitment to provide necessary liquid assets to fund the application. Moreover, Brown now stated that he did not agree to any certain method of financing, particularly that he did not agree to the method of funding, a set-aside fund, specified in the unexecuted Memorandum of Understanding which is MBI Ex. 16 (unexecuted Memorandum of Understanding).

> Q. Well, I'm asking you the method by which you expected him to invest that money; what you told him.
>
> A. I didn't really set a firm method as far as -- if you're talking about setting up a monetary fund or putting money in the bank or some other form, I basically told him that I needed a commitment of up to $100,000 in order to be able to certify, and that once we -- if and when we got the construction permit, at that point in time, that I would either have to have the money directly from them or we'd have to make arrangements to get it from somewhere else.
>
> Q. Did you ever say to him specifically that you would have to have the money directly from him or have a bank loan?
>
> A. I'm attempting to be very factual, and I believe I did. I believe I did, but I don't specifically recall that.
>
> Q. Do you recall any specific discussion with Mr. Barnes where he either said he would make his personal funds available for the construction and operation of the station or where he said he would not?
>
> A. No, I don't recall.
>
> Q. Now, isn't that a strange thing to forget? It's pretty important to you, isn't it? In fact, it was the most important thing at that point, wasn't it?
>
> A. It was very important in the overall -- in all of this, having his commitment, and it's something that you would expect not to have a vague recollection of.
>
> I recall having a specific commitment from them to provide money for this thing, but in going through all of this, and I have been dealing with this thing almost on a day-to-day basis, some of the things that occurred two years ago are not as fresh as some of the things that have occurred in the last few months.

Tr. 738-739.

68. Next Brown changed his testimony again, recalling this time that Barnes told him that it "would not be a problem working things out" on financing the application. This, said Brown, was all he recalled from his three separate discussions of financing with Barnes (Tr. 755-760). Brown testified that he does not recall Barnes ever stating that either he or Callaghan would not be willing to set aside funds for CAVC (Tr. 760-761). Brown testified that he does not recall any discussions with Barnes that Barnes and Callaghan would only be willing to serve as guarantors on a first line indebtedness incurred by CAVC (Tr. 762).

69. Brown never did ask Messrs. Barnes and Callaghan to set aside any funds other than the $5,000 loaned to CAVC, (Tr. 698-699), this despite the fact that the unexecuted Memorandum of Understanding (which Brown submits referenced his understanding of his agreement with Messrs. Barnes and Callaghan) calls for the creation of a guarantor fund (MBI Ex. 16).

70. On or before April 30, 1987, neither Brown nor any other representative of CAVC obtained a bank loan or letter of commitment from a bank to provide the $100,000 he needed to finance station construction and first three months' operating costs. On or before April 30, 1987, neither he nor any other representative of CAVC obtained a written commitment from any individual that that individual would make available to him or to CAVC from personal resources assets of $100,000. Also on or before April 30, 1987, Brown was unaware of any set aside of funds by Messrs. Barnes or Callaghan in the amount of $100,000 for the use of CAVC (Tr. 682-683).

71. Prior to April 30, 1987, Brown contacted 5 Charlottesville banks concerning their loan requirements (Tr. 701). He did not obtain a loan commitment from any of them (Tr. 701).

72. Brown's testimony is inconsistent with the testimony of his two former non-voting stockholders, Barnes and Callaghan. Barnes testified that on or before April 30, 1987, he did not agree to commit to CAVC or to set aside for CAVC any of his personal funds (Tr. 574; 635). Further, he never agreed to provide his personal funds to CAVC and never had any discussion with Brown regarding providing personal funds to CAVC (Tr. 573, 632, 635). Barnes understood that Brown would acquire a conventional loan at some point and at that point, Barnes would be willing to serve as a guarantor on that loan only if the CAVC application appeared likely to be granted in this proceeding. Explained Barnes:

> Q. So, as of April 30th, 1987, you had--is it correct to say that you had no financial commitment whatsoever to fund the costs of Communication Audio Video Corporation?
>
> A. It's fair to say that there was no legal commitment. I felt that if John's application as it developed had legs, I certainly had a moral commitment to help John fund his venture further; but as of April 30, 1987, the extent of my commitment or cash advanced at that point was $2,500, and Mr. Callaghan's cash advanced was $2,500.

Tr. 574

> Q. So you would only be willing to make -- is it a correct statement to say that you'd only be willing to make a guarantee, a commitment to guarantee financing if you were satisfied subsequent to April 30, 1987 that the Communication Audio Video Corporation application stood a good chance of success?
>
> A. I think that is a fair statement. What we envisioned was that CAVC would apply for a conventional loan with one of the banking institutions in Charlottesville at some point and, working with those institutions, we felt fairly confident that if that institution investigating the CAVC application felt comfortable in issuing, say, a credit line of 77 to $100,000, then we would feel comfortable with serving as guarantors on that.

Tr. 575-576; *see also* Tr. 634-635.

73. Moreover, Barnes understood that as of April 30, 1987, Brown intended to rely on revenue from his cable operation and upon other investors to fund CAVC until such time as a conventional loan was acquired. At that time, Barnes would consider serving as a guarantor on the note. Barnes understood the purpose of such a loan would be to fund not construction but rather the first three months of station operation (Tr. 631, 633). This understanding mirrors the language contained in Subsection C of the April 30, 1987 letter (MBI Ex. 15).

74. With respect to his agreement with Brown, Barnes only had one understanding of the term "guarantor" and that was in relation to serving as a guarantor on a loan obtained by CAVC (Tr. 577). Barnes understood his agreement with Brown to be incorporated in Subsection C of the letter of April 30, 1987. He understood that his service as a guarantor on a loan obtained by CAVC would be conditioned upon CAVC obtaining a construction permit in this proceeding, although he was willing to assist at that point in time when CAVC established comparative superiority in this proceeding (Tr. 584-585). Barnes also believes he told Brown before he prepared the April 30, 1987 letter agreement of the differences between that executed agreement and the unexecuted Memorandum of Understanding (Tr. 641).

75. Callaghan also understood that he had agreed to serve as a guarantor on a loan obtained by CAVC, but would not serve as a guarantor on any loan obtained by CAVC before CAVC obtained a construction permit in this proceeding (Tr. 655).

76. Barnes and Callaghan understood the only agreement entered into by themselves with Brown is April 30, 1987 letter, the terms of which they believed to be the only understanding reached by the parties (Tr. 580-581, 651). Barnes understood, as per the terms of the letter of the April 30, 1987, that "in return for participating in a 49% percent equity participation, [Barnes and Callaghan] would provide to John [Brown] $5.000 in monies for use in finalizing his application, any legal counseling that he might need outside the field of communications law . . . and . . . to serve as guarantors of a $100,000 obligation or less to be incurred by CAVC in getting a station off the ground" (Tr. 583). In fact, in pursuance of this letter of April 30, 1987, Messrs. Barnes and Callaghan actually provided Brown with a loan in the amount specified, i.e., $5,000, consisting of $2,500 from each of them (Tr. 584, 596).

77. Barnes recalls giving Brown a copy of the April 30, 1987 letter (Tr. 586-587). He recalls that Brown reviewed the letter and that the other CAVC directors, Reverend Brown and Janice Alcee, were also present when the letter was reviewed (Tr. 586). He recalls that Brown's communications counsel reviewed the letter as well (Tr. 586). He also believes that Brown found the letter acceptable (Tr. 586). He notes that the CAVC Board executed a corporate resolution accepting the letter (Tr. 588).

78. Callaghan's testimony confirms that the only agreement he and Barnes had with CAVC was embodied in the letter of April 30, 1987 (Tr. 651).

79. Although Brown testified that he did not consider Subsection C of the April 30, 1987 letter until the order in this proceeding adding the special issues considered here [i.e., on April 3, 1989], Dygert testified that he discussed the contents of the April 30, 1987 letter with Brown in May of 1987. The meeting was in excess of 30 minutes according to Dygert (Tr. 1358). Dygert testified that at the time he was consulted by Brown concerning the arrangment Brown had with Messrs. Barnes and Callaghan the two documents which Brown presented for his consideration were the executed documents, i.e., the letter of April 30, 1987 and the executed Consent of Directors (Tr. 1303).

80. Although he is not "absolutely certain" of the contents of his discussion with Brown [see Tr. 1358], he believes that he discussed with Brown the term "guarantee" contained in Subsection C of the letter and he believes that he discussed the fact that the guarantor service was conditioned on CAVC's receipt of a construction permit. He also believes he told Brown that "guarantee" did not mean making a loan but merely meant guaranteeing repayment of a loan made by someone else (Tr. 1305-1306).

Misrepresentation Issue

81. This issue concerns whether John M. Brown made misrepresentations or lacked candor in deposition testimony in stating that Barnes and Callaghan continued to be non-voting stockholders in and financing backers of CAVC between July 1987 and October 1988. At the hearing, Brown continued to maintain that Barnes and Callaghan remained financial supporters of and non-voting stockholders in CAVC until October 1988 (Tr. 712, 916).

82. At the hearing Brown testified that he was unhappy with the 49% equity taken by Barnes and Callaghan, having expected it to be 40%, and told Barnes so in May 1987. In response, Barnes relayed a message from Callaghan to the effect that if Brown wanted to make any changes in the agreement, Callaghan wanted his money back and to sever all connection with CAVC (Tr. 705-707, 722, 734). Robert Callaghan confirmed that some days or weeks after the April 30 letter, Barnes told him John Brown was unhappy with a 49% interest for what Barnes and Callaghan had agreed to do in their letter and that his response to Barnes was that if someone would give him back his $2,500 he would step aside completely (Tr. 653-654).

83. Brown paid back Callaghan's $2,500 loan because it was a demand note and he had no choice (Tr. 708-709). Callaghan confirmed that his money was returned 10 days to two weeks after his statement to Barnes (Tr. 656) which point -- probably late May 1987 -- he believed he ceased to be a stockholder (Tr. 659). Although Brown testified that the April 30 letter legally bound Callaghan to remain as a stockholder, notwithstanding return of his money, Brown did not ask his corporate attorney about it even though they met to discuss altering the agreement with respect to the equity shares (Tr. 708, 710, 735-736). Brown said he and Callaghan never at any time had any direct conversation except when Brown asked to and did see Callaghan's financial statement prior to filing (Tr. 741).

84. On September 16, 1987 Brown received a letter from Barnes (MBI Ex. 20) "declining to participate" as a CAVC stockholder and requesting return of his $2,500 loan, which Brown interpreted as expressing a desire to get out of the agreement (Tr. 706-707). Subsequent to that letter Barnes had no further involvement with CAVC (Tr. 707), and Brown never again spoke to either Barnes or Callaghan about his status as a nonvoting stockholder or guarantor (Tr. 712, 720). (Brown subsequently said that he did discuss the matter with Barnes in December 1988 or January 1989, but in the context of MBI's Motion to Enlarge. Tr. 802).

85. After a second Barnes request for return of his money (MBI Ex. 21), the two men agreed to secure the debt by filing a financing statement at the County Clerk's office (Tr. 607-609). Because Brown failed to complete and return the requisite paperwork, Barnes filed a Warrant and Debt in December 1987 with a January 13, 1988 return date (Tr. 610-614). After the filing Barnes spoke to Brown and his mother and the money was returned and the suit dismissed prior to the return date (Tr. 614-620).

86. According to Brown, in October 1988, he "released" Barnes and Callaghan as shareholders by substituting Gray and Sampson. He did not seek permission from Barnes and Callaghan, notwithstanding his stated conviction that they were still bound (Tr. 894-899). This conviction was based on the May 1987 statement of corporate counsel, George Dygert, in response to Brown's objection to the 49% equity interest, that the April 30 agreement was binding on both parties and could not be changed without mutual consent (Tr. 916-918). Although the Consent of Directors (MBI Ex. 18) directed that stock be issued to Barnes and Callaghan, Brown said that they were to receive it only if they were still there when the CP issued; nonetheless, they remained bound as stockholders (Tr. 714-715). Stock was never issued to Barnes or Callaghan (Tr. 714).

87. George Dygert confirmed that Brown had brought in MBI Exhibits 15 and 18 (the Barnes/Callaghan letter of April 30, 1987 and the Consent of Directors to which it was Exhibit A) in early May 1987 and asked certain questions about them (Tr. 1301-1302). As he recalled, Brown's real purpose was to find out if CAVC would avoid the agreement or if it was obligated to issue the stock called for in the agreement, which Dygert said it was (Tr. 1306-1307). He did not recall being asked or telling Brown whether Barnes and Callaghan could be considered or were non-voting stockholders in CAVC (Tr. 1308, 1310). In addition, he was never asked by Brown whether a corporation could compel a non-voting stockholder to remain in that capacity (Tr. 1310). He did tell Brown that while he considered the agreement one sided and unfair, it was binding unless Brown could negotiate a different deal with Barnes and Callaghan (Tr. 1316-1317). Dygert told Brown that any modification in the agreement would require mutual consent, which would probably require returning the money lent by Barnes and Callaghan (Tr. 1342, 1344). He thought he had probably told Brown that Barnes and Callaghan would not be obligated to accept a tender of the money. *Id.* It was Dygert's opinion at hearing that if the money were tendered and refused, Barnes and Callaghan would still legally be stockholders (Tr. 1343).

88. At some point in late 1987 or 1988, Brown spoke to Dygert about giving equity to Alonza Gray and Ralph Sampson or one of his corporations, in exchange for construction and operating financing, which Dygert understood was to replace lost financing, some or all of which had been from Barnes and Callaghan (Tr. 1320-1324). There was never any discussion about how the Barnes/Callaghan stock could be transferred to someone else (Tr. 1326-1327). He did not think Brown had asked him how to terminate stock interests (Tr. 1350).

89. John Brown's father, the Reverend Charles H. Brown, said he has been Secretary and a Director of CAVC since April 30, 1987 (Tr. 962). His son told him Barnes and Callaghan were nonvoting stockholders and were going to put the money up to provide financing backing for the station, although the matter was never discussed at any Board meeting he attended (Tr. 962-970). About three months later -- perhaps as much as six months -- his son told him Barnes and Callaghan were no longer part of the company; he said they were out, which his father understood to mean they were no longer connected with the station at all (Tr. 971-972). John Brown did not then say he had replacements in mind, although he did say so later in 1987 (Tr. 972-973).

90. Janice V. Alcee, who said she had been a Director of CAVC for about three years at the time of her testimony, knew only what John Brown told her. She took his word on everything (Tr. 1367, 1372, 1393). Alcee said that although she signed the Consent of Directors (MBI Ex. 18) reflecting attachment of the Barnes/Callaghan letter (MBI Ex. 15), she never saw the letter until her deposition was taken (Tr. 1368-1369, 1387). Brown told her Barnes and Callaghan would be 49% nonvoting stockholders and would provide the financing, but not whether they would be lenders or guarantors (Tr. 1369, 1372-1373). She did know that the April 30 letter was the only agreement with Barnes and Callaghan (Tr. 1376). In September 1988 Brown told her Barnes and Callaghan were no longer stockholders (Tr. 1378).

91. John Brown said he called Alonza Gray about becoming a stockholder in May 1987 after Callaghan said he wanted out (Tr. 924). Brown first said that he did not offer an interest but only sought to be prepared for the contingency (Tr. 894). He later said he told Gray that one stockholder wanted out and if Gray had money he might be substituted (Tr. 924-925). Brown also said he had not told Gray between April 30, 1987 and June 1988 that any stock might be available or that Gray might be substituted (Tr. 936-937). Gray had been involved with CAVC sine 1985 and said that he became an integral part of its operations after he was made an officer and director (Tr. 1227, 1239-1240). In 1986 he told Brown he wanted to be part of the application (Tr: 1239).

92. About June 1, 1987, Gray lent CAVC $3,000, most of which was used to pay back Callaghan (Tr. 926, 938). Brown said Gray was not then made a stockholder, although he wanted to be, because Brown deemed it inconvenient and imprudent due to an unresolved business matter between the two men having nothing to do with the application (Tr. 926-927). Brown said there was no discussion of any interest on the loan and no agreement was reached at that time about a stock interest for Gray (Tr. 927, 937). However, the idea was that there might be some future stock or security interest (Tr. 947). There was no return of any kind for the loan (Tr. 1141). Brown later said that a stock interest had never been discussed as of August 1987 (Tr. 1145-1146). He said Gray made the loan out of friendship and interest in CAVC's audio service to the minority community (Tr. 1147, 1151). Brown also said that between May and August 1987, there might have been discussion of some future ownership interest, (Tr. 1155-1156), and that there was no discussion of Gray becoming a stockholder until October 1988 when he became one (Tr. 928, 930).

93. Nor was that the extent of Gray's financial accommodation to CAVC: According to Brown, his father consolidated several bank loans he had taken out for the benefit of CAVC into a single $15,000 loan in 1986, with Alonza Gray serving as the bank loan officer (Tr. 939-940, 1012-1013). Gray was employed by the bank from September 1984 until he went to work for Ralph Sampson in January 1987 (Tr. 1240). Brown said that in June or July 1987, Alonza Gray picked up the payments on this loan, previously made by CAVC (Tr. 939, 941). Brown said he told Gray in June or July of the following year (1988) that if he continued the payments he could have CAVC stock (Tr. 1160). At the time, however, Brown did not know why Gray was paying it back (Tr. 942). Later he said Gray's only reason for assuming the loan was to support the audio service (Tr. 1138). Still later Brown said Gray assumed the loan because as the bank loan officer when it was made, he wanted to be sure it was taken care of (Tr. 1148). Gray in fact made the first payment on this loan on March 6, 1O 1987. *Order*, FCC 89M-2199, released September 1, 1989.

94. By letter of June 4, 1987 (MBI Ex. 29), John Brown asked Gray to assume full responsibility for the loan (Tr. 1136-1137). He also asked for Gray's agreement to co-sign a $100,000 loan to CAVC (MBI Ex. 29). At this time Brown knew Callaghan had refused to finance CAVC, but said Dygert had told him Callaghan could be forced to do so by lawsuit (Tr. 1190-1192). Brown conceded that Dygert never said that a successful lawsuit would mean Callaghan had to guarantee a loan (Tr. 1193). Brown testified that Gray was to receive nothing in return for picking up the loan (Tr. 1137). Not only was the loan assumed without consideration, but Brown was under no obligation to repay Gray (Tr. 1148).

95. Brown said that Gray had no money invested in CAVC prior to August 3, 1987 and he had no idea what Gray meant in a letter of that date (MBI Ex. 30) which referred to the "total" of $18,727.67 Gray had "invested in CAVC" (Tr. 992-993, 1145). Gray's net worth, according to a financial statement he sent Brown with the letter, was $6,500 (Tr. 1209). At the time Brown received that letter he said he did not know Barnes was out as a stockholder, although he did know Barnes' financial statement would not support the $100,000 CAVC loan Barnes had agreed to guarantee (Tr. 1194).

96. John Brown said that Gray was later permitted to convert his interest to stock (Tr. 1138). The matter of giving Gray stock was brought up in the summer of 1988 because Brown was looking at bringing in Ralph Sampson and Gray was then working for Sampson (Tr. 1150).

97. Alonza Gray was unclear about whether he was ever a CAVC stockholder. He said there was an understanding about ownership but he never received a document reciting a percentage (Tr. 1228-1229). According to Gray, he understood when he took over the $15,000 note that he was doing it to get a 7% interest in CAVC (Tr. 1229). Prior to receipt of the June 4, 1987 letter from Brown (MBI Ex. 29), Gray said he and Brown had discussed Gray advancing the $3,000 and assuming the loan, for which he would get 7% equity (Tr. 1230-1231). They also discussed his signing for a $100,000 line of credit, which Gray said they both understood, prior to Brown's June 4, 1987 letter, was also part of the consideration for the equity (Tr. 1231-1232). Brown said "take over these three conditions, you'll get 7% of CAVC" (Tr. 1295).

98. Gray explained that his reference to "total invested" in CAVC meant payment for equity (Tr 1234). The letter was written to reaffirm that Gray would assume the $15,000 note for a 7% interest (Tr. 1233). He understood that he would replace either Barnes or Callaghan (Tr. 1236, 1239). Gray believed he became an equity owner when he began paying back the $15,000 loan, although Brown did not tell him so (Tr. 1283-1284). Brown never said anything to suggest Gray would not get an interest at the time he agreed to the transaction (Tr. 1294).

99. Gray said that prior to the summer 1988 plan to use Ralph Sampson as a financial source, CAVC was to get a bank loan, that Brown had spoken to the Vice President of a Charlottesvilie bank prior to his June 4, 1987 letter to Gray and been told that the CAVC directors would have to co-sign, which was why the letter asked Gray to agree to do so (Tr. 1242). According to Gray, he stopped being an investor "two or three weeks ago" (Tr. 1243), or one or two weeks ago, (Tr. 1245), with Brown to assume the $15,000 note and repay the approximately $5,000 Gray has already paid on it (Tr. 1244-1245). Gray said he stopped making payments on the note in February or March 1989 and told Brown prior to the next payment date (Tr. 1262-1263). Although the note was to Brown's father and not CAVC, Gray thought he could get equity in CAVC by assuming it because the Reverend Brown was a director and because John Brown led him to think so (Tr. 1266). Gray said he asked Brown in June 1989 for his money back because it was taking too long (Tr. 1276). He said he had had the same thought in mind when he stopped paying on the note in February or March (Tr. 1277).

100. John Brown testified that in April 1987 when Alonza Gray went to Houston with Ralph Sampson, Brown asked him if Sampson would be interested in investing in CAVC as a nonvoting stockholder and Gray said he would not (Tr. 1162). (Gray variously said he went to Houston in December 1987 (Tr. 1228), and February 1987 (Tr. 1253, which seems more likely.) In June or July of 1988, Sampson reconsidered and on November 30 wrote a letter agreeing to provide financing of $300,000 if CAVC got the grant (MBI Ex. 31; Tr. 1163-1165). Brown said there is no writing reflecting Sampson's ownership interest or Brown's offer of one, but that he did ask and MBI Exhibit 31 reflects Sampson's agreement, previously given orally (Tr. 1166, 1168-1172).

101. By letter of April 18, 1989 (MBI Ex. 33), Sampson withdrew his offer of financing, but made no reference to giving up any ownership interest; nor does any other writing (Tr. 1173-1174). According to Alonza Gray, Brown never said Sampson was to replace Barnes or Callaghan; in the summer of 1988 Sampson was simply to provide funding (Tr. 1237). Gray also said Sampson was to have the same position as Gray, that Gray and Brown discussed "his becoming not an owner, but I guess an equity--the same position that I would have had in the company at that time". (Tr. 1238).

Section 1.65 Issue

102. This issue seeks to determine whether CAVC failed to make timely amendment reporting lack of the requisite financial resources. The findings relevant to the issue have already been made, but for simplicity will be repeated. When CAVC filed, Brown said he certified in reliance upon financing from Barnes and Callaghan (MBI Exs. 15, 18; Tr 749-751). The commitment was for a total of $100,000 (MBI Ex. 15). The financial statements of Barnes and Callaghan reflected that Callaghan had funds in excess of $100,000, but that Barnes had less than $50,000 (Tr. 240-241). Very shortly after the application was filed, Callaghan withdrew and asked return of a $2,500 loan he had made at the time of his commitment; it had been returned by the end of May 1987 (Tr. 653-654, 656, 659, 708-709). On September 16, 1987, Barnes also withdrew and asked for return of his $2,500 loan (MBI Ex. 20; Tr. 706-707). The money was returned at the end of 1987 or in January 1988 (Tr 614). On August 3, 1987, Alonza Gray agreed to co-sign a $100,000 corporate note (MBI Ex. 30). Gray's net worth was $6,500 (Tr. 1209). No steps were taken to get such a line of credit (Tr. 1142-1144). On November 30, 1988, Ralph Sampson agreed to provide financing in the amount of $300,000 in the event of a grant (MBI Exs. 31-32). Brown said that this letter reflected an oral agreement reached during the summer of 1988 (Tr. 1164-1170). On April 18, 1989, Sampson withdrew his offer of financing (MBI Ex. 33).

Financial Qualifications

103. On or about May 15, 1989, James L. Jessup, Jr. purported to become a 49% nonvoting shareholder of CAVC. Jessup paid nothing for his stock (Tr. 1449), although CAVC stock has a par value of $10. The sole consideration for the 49% interest is Jessup's willingness to make available a line of credit discussed, *below*, that CAVC is obligated to repay at a rate slightly above the rate charged by the bank to Jessup (Tr. 1441).

104. Jessup secured a personal line of credit from Sovran Bank, N.A. in the amount of $250,000. The line of credit, which is secured by Jessup's personal assets (Tr. 1434), was signed on May 16, 1989 "to fund operation of an FM station. Funds may be used for working capital and equipment purchases" (MBI Ex. 34, p. 1).

105. Under the terms of the Jessup/Sovran agreement, the interest rate on the outstanding balance is computed at the prime rate plus .50%. For one year after the first advance is made, the repayment terms are described as "on demand, with interest payable monthly." Thereafter, the loan would convert to a five year amortization schedule. *Id.*

106. As of the hearing date, Jessup had requested and received one advance from Sovran on his line of credit for $32,400 in September 1989 to pay a CAVC legal bill and incidental expenses (Tr. 1436, 1439, 1558-1559). John Brown, CAVC's voting shareholder, must request money from Jessup; he cannot request funds directly from Sovran (Tr. 1440).

107. Both Jessup and Malcolm Inge, Vice President and Manager of the private banking division of Sovran Bank in Charlottesville, Virginia, testified that the "working capital" phraseology of the loan purpose is intended to include the costs of prosecuting the CAVC application, including legal fees (Tr. 1469, 1557).

108. A document dated June 7, 1989, entitled "Promissory Note of Communication Audio Video Corporation", constitutes the agreement between Jessup and CAVC, whereby Jessup agreed to lend CAVC $250,000 in the form of "advances from time to time as they may be made by James L. Jessup, Jr. . . .to be used for the construction, equipping and operation of an FM Radio Station in Charlottesville, Virginia" (MBI Ex. 35, p. 1). That Promissory Note was revised on September 7, 1989 to substitute the statement that the note was for "advances from time to time as *must* be provided by James L. Jessup, Jr., *upon request of John M. Brown on behalf of Communication Audio Video Corporation* . . . to be used for the construction, equipping and operation of an FM Radio Station in Charlottesville, Virginia" (CAVC Ex. 2, p. 3)(emphasis added) (Tr. 1433). In all other respects, the June 7 note and the September 7 note are the same.

109. The note provides for the repayment of any portion of the $250,000 advanced by Jessup by CAVC at a rate of 1% above Sovran Bank prime, .50% higher than the interest rate at which Jessup would borrow from Sovran (CAVC Ex. 2, p. 3; Tr. 1441). Repayment by CAVC is to commence six months from the date of the note, in March 1990 (Tr. 1454-1455). Interest on the outstanding balance would accumulate but not be paid during the first six months; thereafter, principal and interest "shall be due and payable monthly in an amount sufficient to amortize the loan over the period ending November 16, 1994" (CAVC Ex. 2, p. 3).

110. If any installment of interest or principal is not paid when due, Jessup "may without notice or demand, declare the entire sum then unpaid, together with accrued interest thereon immediately due and payable." The indebtedness is to be secured by all of the equipment of CAVC and the "appropriate security instruments will be executed by Maker [CAVC] and provided to payee [Jessup] from time to time as required by Payee" (CAVC Ex. 2, pp. 3- 4).

111. The promissory note was drafted by John Brown (Tr. 1438). No personal guarantee of John Brown is included in the promissory note (Tr. 1451). Jessup believes the note is secured by the assets of CAVC, "which at this time [he stated] are zero" (Tr. 1452). Jessup further acknowledges that if CAVC does not get the license, he will not be repaid (Tr. 1452). CAVC is presently defunct and producing no revenue (Tr. 1458).

112. Although repayment of the outstanding principal and interest by CAVC to Jessup is to begin in March 1990, no schedule of repayment has yet been developed. Jessup assumed that the total amount advanced at the time repayment is to commence would be used as the basis of a loan repayment schedule with interest prorated over the full period of the note ending November 16,

1994 (Tr. 1455-1456). Jessup believes that if CAVC fails to repay the indebtedness he could, at his sole option, resort to foreclosure and attachment procedures (Tr. 1479-1480, 1504).

113. Jessup has been given a list of CAVC's assets and capital, but no security instruments, as required by the note, have been executed (Tr. 1481). No written cost projections were provided Jessup and he did not know how much money would be required for prosecution, construction and initial operation of the station (Tr. 1457, 1481-1482, 1485). Moreover, no such documentation or specific information was provided to the bank prior to securing the $250,000 line of credit (Tr. 1481, 1486, 1578). The $250,000 figure was, according to Jessup, "what was required by the Commission to have the application--or you had to show that that money was available to be able to--for them to grant the license." That is what Jessup told the bank based on his understanding from John Brown (Tr. 1488).

114. Jessup's willingness to arrange the Sovran line of credit was predicated on his belief that he was acquiring an unencumbered 49% interest in CAVC. He stated that if there is a problem arising from other claims on the stock, he is "confident" that Mr. Brown "will endeavor to have it taken care of" and that monies from the line of credit could be used for that purpose (Tr. 1494). Jessup also stated that the line of credit could be used to pay former legal counsel (Tr. 1465, 1472); CAVC's local corporate counsel (Tr. 1475); Brown's expenses (Tr. 1474); and unlimited legal fees incurred in connection with the prosecution of the application (Tr. 1478).

115. When Jessup secured the line of credit from Sovran Bank, he did not inform the bank of the unresolved basic qualifying issues that had been designated against CAVC (Tr. 1499, 1502-1503). Jessup testified that he did not tell the bank of the outstanding questions concerning CAVC's qualifications because he did not know what the questions were, although he knew there were "problems" with the application (Tr. 1503). It was Jessup's belief that if the problems were potentially serious, CAVC would already be out of the case and the fact that the application was still pending indicated that if the $250,000 was in place, CAVC's application would still be "acceptable" (Tr 1503-1504).

116. The line of credit agreement with Sovran Bank requires, *inter alia*, that "All information that has been furnished to the Bank prior to this commitment being issued is true and accurate" (MBI Ex. 34). Malcolm Inge testified that he was not aware of the issues against CAVC at the time Jessup's line of credit was approved (Tr. 1567-1569), and that he would have wanted to know more about those issues had he been made aware of their existence (Tr. 1597).

117. CAVC presented no competent evidence regarding the projected costs of prosecution, construction and initial operation of the proposed station. The evidence in the record consists of undocumented, incidental and generalized statements of various witnesses that differ from each other: John Brown testified that in 1987 the proposed station's total budget was estimated to be $100,000 (Tr. 682); Alonza Gray testified that Brown told him in 1986 that it would take between $250,000 and $300,000 to prosecute, construct and operate the proposed station (TR. 1255-1257); CAVC received a $300,000 commitment from Ralph Sampson, Jr. in 1988 (MBI Exs. 31-33); and, finally, a $250,000 line of credit was secured by James L. Jessup, Jr.

CONCLUSIONS

Basic Issues - CAVC

False Financial Certification

118. CAVC estimated it would need $100,000 to construct and initially operate its proposed station. CAVC's certification that it was financially qualified rested solely on the understanding Brown reached with two Charlottesville lawyers, Barnes and Callaghan. That understanding is contained in a letter dated April 30, 1987 signed by Barnes, Callaghan and Brown. That letter and a Consent of Directors whereby the Board of Directors of CAVC adopted by unanimous consent the offer set forth by Barnes and Callaghan in the April 30, 1987 letter are the only documents executed by Barnes, Callaghan and Brown concerning the funding of CAVC. The April 30 letter agreement provided for Barnes and Callaghan to receive a 49% equity interest. As consideration, they agreed to (a) loan $5000 to CAVC; (b) provide non-Communications law legal services; and, if CAVC received a construction permit, guarantee repayment of a loan not to exceed $100,000 "to address any defaults by the corporation in servicing its financial commitments in the first three months of on-air operation" (MBI Ex. 15). However, despite the fact that the agreement made plain that Barnes and Callaghan had agreed only to act as a guarantor, Brown never obtained a bank loan. Moreover, the guarantor provision only applied to funds committed in the first three months of operation; CAVC has produced no evidence showing the source of funds for prosecution and construction costs. It is, therefore, abundantly clear that CAVC certified it was financially qualified without any basis or justification.

119. Despite CAVC's attempts to portray Brown as a well meaning applicant who acted in good faith, the record reveals him to be a man who fully understood what was required to certify CAVC's finances and who knowingly made a false certification. Brown's testimony is a record of purposeful deception. It is evasive, rife with inconsistencies, contrary to the documentary evidence, contrary to the consistent testimony of CAVC's non-voting stockholders, Barnes and Callaghan, and even the testimony of CAVC's own corporate counsel, George Dygert. Brown's tale is entirely unworthy of belief.

120. Brown would have the court believe that in April 1987, Barnes agreed to directly commit $100,000 to CAVC for its use to prosecute CAVC's application, construct CAVC's station, and operate CAVC's station for three months without revenue. There is not a shred of support for Brown's fanciful tale. Barnes, a disinterested witness, has denied ever making such a statement. Moreover, the only written agreement that Brown concedes existed between the parties calls for Barnes and Callaghan's services only as loan guarantors for a loan that would be limited in its coverage to the three months of on-air operation. Brown's assertion is also rebutted by the fact that all of the Directors of CAVC specifically adopted the April 30, 1987 letter via the executed Consent of Directors at a CAVC board meeting. Also, Brown's assertion that he had access to $100,000 from Barnes (upon demand) cannot be reconciled with the fact that

Brown has admitted going to 5 separate Charlottesville banks in search of a loan for CAVC and to asking Alonza Gray to be a co-signor on a $100,000 loan.

121. Brown would also have the court believe that the unexecuted Memorandum of Understanding constituted the essential agreement among Brown, Barnes and Callaghan. However, Callaghan was not a party to that agreement yet was clearly a party to the *actual* agreement according to Brown's testimony. In addition, the Memorandum makes reference to an unnamed group of "other investing individuals" and so cannot be viewed as "final" or as a commitment by Barnes in the absence of others. Also, the Memorandum calls for the creation of a Guaranteed Monetary Fund which, Brown admits, was never created and which, Brown admits, he never inquired about at all after April 30, 1987. In this connection, it is noteworthy that not even the unexecuted documents including Brown's own original proposal (MBI Ex. 14) provide for a direct commitment of funds.

122. Brown's own proposal by which he originally solicited Barnes' participation in CAVC repeatedly uses the term "guarantor" (MBI Ex. 14). Brown understood the term "guarantor" in his document to mean one who would be available to finance a debt in the event of default. Notwithstanding, Brown asserts that he understood that same term, "guarantor," differently when used in the April 30, 1987 agreement. He claims he was ignorant of the legal meaning of the term "guarantor" in the context of the April 30, 1987 agreement and thought the term "guarantor" meant "direct commitment." Brown's testimony is patently incredible on its face. Significantly, Brown's new found definition is nowhere to be found in any of the documents or in anyone's testimony other than Brown's.

123. Moreover, the attempt to portray Brown as naive and unsophisticated in business matters is not supported by the record. Brown was the owner of a cable programming service and presently operates a residential and commercial building and repair and remodeling company and also manages residential property. Further, Brown testified he clearly understood the FCC's financial certification requirement and, in fact, recited in the hearing room a very precise definition of "net liquid assets" which he said he imparted to Barnes before April 30, 1987. Also, Brown is the man who has diligently pursued this matter through three separate draft agreements included one which he prepared himself, five separate bank contacts, and a communications attorney and a corporate attorney.

124. Finally, Brown would have the court believe that although Brown read the April 30, 1987 letter on April 30, 1987 in Barnes office, considered it again that same day and discussed it with CAVC's communications counsel (with whom he visited for 4 and 1/2 hours), and reviewed it in connection with his visit to his local counsel, Dygert, and his review of the McClenahan Motion to Enlarge, he, Brown, never upon any one of these several occasions stopped to consider Subsection C of this letter, until the Presiding Judge's April 3, 1987 Order came out adding issues. Further, it is asserted that Brown did not understand the letter to differ from the unexecuted Memorandum of Understanding despite the fact that the Memorandum is in appearance quite different from the letter; despite the fact that the Memorandum, unlike the letter, fails to provide for a $5,000 loan to Brown; despite the fact that the Memorandum, unlike the letter, included a Guarantee Monetary Fund provision; despite the fact that the Memorandum, unlike the letter, did not specify that Messrs. Barnes and Callaghan would provide free non-communications legal work for CAVC; despite the fact that the Memorandum, unlike the letter, contains no provision for Messrs. Barnes and Callaghan to serve as Guarantors on a $100,000 note which service is conditioned on receipt of a CP; and despite the fact that Brown had obviously spent hours preparing his proposal and negotiating with Barnes to produce the April 30, 1987 "final draft." In short, Brown would have the Court believe that he noticed no difference between the April 30, 1987 letter and the unexecuted Memorandum of Understanding despite the fact that he had every incentive to want to know exactly what the terms of that April 30, 1987 letter specified. Brown's story is patently incredible. It reinforces the conclusion that John Brown cannot be believed.

125. In sum, the evidence establishes that far from being naive or inattentive, Brown was a knowing, deliberate and deeply involved actor. Brown tried everything that he could to get financing so that he could properly certify. He knew as of April 30, 1987 that he had failed in his efforts. He knowingly accepted the Barnes and Callaghan offer expressed in the letter of April 30, 1987 because he was out of time and it was all he had. He falsely certified hoping to remedy his financing problems before anyone else would find out that he lacked what he needed. Now, he seeks to explain away his impropriety through a series of contrivances and untruths. Brown's egregious lack of candor at the hearing, considered separately or together with his willful false certification, require CAVC's disqualification.

Misrepresentation Issue

126. The record leaves no doubt that John Brown knew long before October 1988 that Lindsay Barnes and Robert Callaghan were not stockholders in CAVC as he testified they were in his deposition. Even his two friendliest witnesses--Janice Alcee and his father--admitted to knowing sooner, although neither of them knew much else about the corporation they purportedly direct. Moreover, they both knew because John Brown told them so. While Alcee claimed Brown did not tell her until September 1988, the Reverend Brown said that his son told him between three and six months after the April 30, 1987 Board meeting, or at least a year before the October 1988 date testified to by Brown in his deposition and again at hearing.

127. It is undisputed that John Brown knew Callaghan wanted to sever all connection with CAVC within weeks after the application was filed and that his $2,500 loan to the corporation, a stipulated part of the consideration for his stock, was returned in late May 1987 in response to his statement that if his money were returned, he would step aside completely. It is also undisputed that on September 16, 1987, Barnes told Brown in writing that he declined to participate as a stockholder and demanded his $2,500 back. While the money was not returned until after a further written demand, an oral agreement to secure the debt by filing a financing statement, the filing of a lawsuit when Brown did not honour the oral agreement, and a further personal discussion including Brown's mother, it was ultimately returned and the suit dropped in January 1988.

128. Brown's actions also make it clear that Barnes and Callaghan had severed their relationship with CAVC by September 1987 and from that time forward Brown did not consider them to be shareholders in CAVC. After Callaghan was repaid his $2,500 loan to the company and Barnes informed Brown of his desire to be repaid in September of 1987, Brown admits that he did not ask either gentleman to provide money to CAVC. Brown admits that after September of 1987 neither Barnes nor Callaghan performed any role whatsoever as non-voting shareholders in or financial backers of CAVC. In addition, Brown never indicated to either Barnes or Callaghan that he continued to consider them non-voting stockholders. In fact, Brown was fast at work soliciting new non-voting principals. It was not until November 1988 that Ralph Sampson provided the financing letter Brown had sought before he ever approached Barnes. If Brown did regard Barnes and Callaghan as the basis for CAVC's financing, he simply would not have worked so diligently to obtain funding support from others. The only logical explanation for Brown's behavior is that he knew he had lost his financing. The fact that he didn't have a ready substitute for Barnes and Callaghan and would face disqualification if he candidly admitted the loss led Brown to invent his fiction that he had a legal power to bind Barnes and Callaghan.

129. Brown's untruth and fabrication is made especially apparent by the testimony of George Dygert, Brown's own corporate counsel. Brown claims Dygert told him that, as a matter of law, Barnes and Callgahan were bound to serve as non-voting stockholders in and financial backers of CAVC. Dygert denies ever telling Brown that. Indeed, excepting the 45 day period directly preceding the hearing in this case, Dygert does not recall ever being asked to give his advice to Brown on the question of whether Barnes and Callaghan were somehow legally bound to serve as non-voting stockholders in and financial backers of CAVC.

130. Indeed, Dygert contradicted Brown in other respects. Brown testified that he did not consult with Dygert about finding a way to get out of the deal he struck with Messrs. Barnes and Callaghan that is specified in the April 30, 1987 letter; Dygert testified that he understood *the purpose* of Brown's visit with him to be to determine if a way existed for Brown to get out of the deal he had struck with Barnes and Callaghan as specified in the April 30, 1987 letter.

131. Once again, Brown's testimony, viewed in the light of reason and logic, dissembles into an amalgam of falsehood and evasiveness. It is plain that Brown is simply willing to speak falsehood if he believes that falsehood may save him from disqualification.

132. The Commission has found the perpetration of deliberate falsehoods in testimony given in Commission proceedings to warrant disqualification. *See Opal Chadwell*, 63 RR 2d 1608 (Rev. Bd. 1987); *see The Old Time Religion Hour, Inc.*, 54 RR 2d 989 (Rev. Bd. 1983). The facts of concealment, the presence of an intent or motive to conceal, and record evidence of testimonial conflict form the basis for disqualification. *Id.* Here Brown not only failed to reveal to the Commission the fact that Messrs. Barnes and Callaghan departed by September of 1987 and took with them the applicant's financial support, such as it was, but also has fabricated an elaborate, unbelievable explanation for this concealment in an effort to avoid admission of *the facts* as the documents reveal them and as the testimony of Messrs. Barnes, Callaghan, Gray and Dygert corroborate. Accordingly, disqualification under the misrepresentation issue is mandated.

Section 1. 65 Issue

133. CAVC's justification for not amending its application to report the loss of its financing is predicated upon the "plausibility" of Brown's testimony with respect to the issue analyzed above. Given the presence of abundant record evidence that Brown knew he was financially unqualified during the period of July of 1987 to October of 1988, and the repeated instances of Brown's purposeful concealment of the truth from this agency, there is no doubt that CAVC also intentionally violated Section 1.65 of the Rules. Accordingly, in line with precedent such as *Valley Broadcasting Company*, 4 FCC Rcd 2611 (1989), CAVC must be found disqualified under this issue.

Financial Qualifications

134. In order to be financially qualified, an applicant must compile a realistic estimate of proposed construction and initial operation costs and adequately document a reasonably available financial plan to fund the proposed costs. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988). CAVC's showing fails on both counts.

135. CAVC presented no competent evidence regarding the projected costs of prosecution, construction and initial operation of the proposed station. The only document which makes reference to CAVC's projected costs is the proposal prepared by Brown in April 1987 (MBI Ex. 14). CAVC never offered this document to substantiate the validity of its cost estimates. In fact, it was offered by McClenahan and received solely to show the proposal presented to Barnes in his meeting with Brown in April 1987 (see Tr. 565, 570-573). CAVC now seeks to rely on this document to establish the validity of CAVC's cost estimate. Acceptance of the document for the purposes now sought by CAVC would prejudice the parties who have not had an opportunity to test the accuracy of the cost breakdown. Clearly, if CAVC wanted to rely on this document to show it was financially qualified, it should have timely offered it for that purpose. Significantly, CAVC did not offer Brown's proposal in the trial of the false financial certification issue or in the later hearing on the financial qualifications issue. Moreover, even under the latter issue, CAVC presented no up-to-date revised, itemized budget for costs. CAVC's attempt to cure these deficiencies now by relying on the cost breakdown in Brown's 1987 proposal is improper, comes much too late, and is rejected.

136. The only evidence in the record as to CAVC's projected costs consists of undocumented, incidental and generalized statements of various witnesses that differ from each other: John Brown testified that in 1987 the proposed station's total budget was estimated to be $100,000 (Tr. 682); Alonza Gray testified that Brown told him in 1986 that it would take between $250,000 and $300,000 to prosecute, construct and operate the proposed station (Tr. 1255-1257); CAVC received a $300,000 commitment from Ralph Sampson, Jr in 1988 (MBI Exs. 31-33); and, finally, a $250,000 line of credit was secured by James L. Jessup, Jr. In this connection, no one knows why the $250,000 figure was selected. The record contains no evidence of how this figure was arrived at or its component parts. CAVC had the burdens of proceeding

and proof to establish it is financially qualified. In the absence of proof that it has reasonably determined its costs of prosecution, construction and initial station operation, it has not met this burden.

137. In addition to CAVC's failure to demonstrate with competent evidence its cost estimates, questions concerning the availability of the $250,000 commitment from James Jessup remain unresolved. Jessup has unequivocally testified that his provision of funds to CAVC is not a gift or capital contribution but is a loan. Therefore, CAVC must repay this debt. Under the terms of the September 7, 1989 promissory note, CAVC was required to commence payments in March 1990 on the money it has borrowed (which now amounts to over $32,000 and can be expected to grow considerably as this litigation progresses). CAVC is required to pay principal and interest on a monthly basis. It is conceded CAVC cannot meet the repayment terms. CAVC has no present source of income and no measurable assets. Given the facts here, there is little doubt that CAVC will default on its loan obligation to Jessup. Jessup understands that his legal remedy is foreclosure and attachment of CAVC's assets. CAVC has utterly failed to demonstrate that it has the wherewithal to avoid this fate. Rather, on the record evidence, this fate seems ineluctable. CAVC has, therefore, failed to show that it has reasonable assurance of a source of funds to meet its proposed costs, even *assuming, arguendo*, the $250,000 figure proffered by CAVC is accepted. For the foregoing reasons, it is concluded that CAVC is unqualified under the financial qualifications issue.

Comparative Issue

138. Neither McClenahan or Spectrum suffer a diversification demerit. Also, both propose installation of an auxiliary transmitter.

139. Both McClenahan and Spectrum receive 100% quantitative integration credit. McClenahan proposes the full-time participation of its 100% owners. Mr. McClenahan (51%) will serve as General Manager and Mrs. McClenahan (49%) will serve as Operations Director. Both will hold management level positions with supervisory responsibilities. Spectrum proposes the full-time participation of its holders of voting stock. Deborah Royster (51.2%) will serve as General Manager, Alicia Lugo (24.4%) will serve as Public Affairs Director, and Henry Truzy, Jr. (24.4%)[8] will serve as Program Director. All will occupy management level positions with supervisory responsibilities. The quantitative integration proposals of McClenahan and Spectrum will be credited.

140. McClenahan challenges Spectrum's integration proposal, arguing that Spectrum is a classic "sham" applicant since Spectrum is the alter ego of one person, Deborah Royster. However, "applications will be found to be shams only where there is a basis for inferring that non-voting shareholders will exercise influence or control of an ongoing business." *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 (1988). There is here no such question; the attack is solely on the relative activity of the active partners. In essence, McClenahan contends that because most of the work of preparing the application was done by Royster, the largest single stockholder, no other owner may receive integration credit. McClenahan's contention is rejected. The fact that Royster has played the major role in the application stage is of no consequence particularly, where, as here, Royster is the largest single shareholder. Also, unlike the other participating owners, Royster is a lawyer with some familiarity with the Commission's processes. Under the circumstances, Royster was the appropriate principal to have prime responsibility for the preparation and prosecution of Spectrum's application. In addition, the record makes clear that Truzy and Lugo have participated in the application preparation and prosecution and both are fully familiar with the duties they will perform. There is not a shred of evidence indicating that Truzy and Lugo will not carry out their integration proposals.

141. McClenahan also urges that Royster should receive no integration credit although she has pledged to terminate her work as a lawyer. According to McClenahan, Royster has not made the additional showing of reliability required of a professional. The attack on Royster's integration pledge is without basis. McClenahan's assertion that professionals must make an extra showing of reliability finds no support. It should be noted that Royster is not a self employed professional. Neither in fact nor in law is there the slightest reason to doubt her integration commitment. McClenahan's attack on her integration pledge is based solely on impermissible speculation. *See Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 n. 7 (Rev. Bd. 1969).

142. CAVC also attacks the *bona fides* of Spectrum's proposal. It contends that because Lugo and Truzy each hold only 4.6% of Spectrum's equity, it must be concluded that they do not have actual rights of management control, citing *Independent Masters, Ltd.*, 104 FCC 2d 178, 193 (Rev. Bd. 1986). The case cited is not on point. In *Independent Masters*, the successful applicant was a limited partnership in which the only general partner was a 10% equity owner. The Board's concern was with the ratio between total voting equity and total nonvoting equity, not with the relative size of the holdings of the various voting owners. In this case, the three voting owners hold just under 45% of the total equity. CAVC has not cited and the Presiding Judge is not aware where under the facts of this case integration credit has been denied.

143. Spectrum contends that McClenahan should not receive credit for Mrs. McClenahan's participation on the ground that she will perform non-managerial functions. However, Mrs. McClenahan, as Operations Director, will hold a specific management position. The description of her supervisorial duties and policy coordination duties make it clear she will be in management and will be a policy maker. The cases relied on by Spectrum are inapposite since unlike the facts here, the principals there had neither a role in management, supervision of station personnel, or a meaningful involvement in station policymaking. McClenahan receives 100% quantitative integration credit.

144. Since McClenahan and Spectrum are quantitatively equal, the respective qualitative attributes are the deciding factor. Spectrum is qualitatively superior.[9] Spectrum receives substantial minority enhancement for its 100% integration ownership. McClenahan receives no such credit. Also, Spectrum proposes 75.6% female enhancement as opposed to McClenahan's 49%. On the local residence factor, Spectrum's Alicia Lugo (24.4%) is a lifelong resident of Charlottesville and Henry Truzy (24.4%) has lived there since 1984. Deborah Royster also receives slight credit for her promise to move to Charlottesville. *Policy Statement on Compative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965); *Bradley, Hand, and Triplett*, 89 FCC 2d

657 (Rev. Bd. 1982). McClenahan's integrated principals are long term residents of the service area but have never lived in the principal community. Residence in the principal community to be served is of primary importance. *Policy Statement*, *supra*, 1 FCC 2d 393, 396; see also *Renee Marie Kramer*, 5 FCC Rcd 563 (1990) released January 29, 1990 (Rev. Bd.). Since the McClenahans have never resided in the principal community, McClenahan rates only a slight edge on the residence factor. With respect to civic activities, although not of recent vintage, the McClenahan's showing is superior to that of Spectrum. Although Lugo has a long history of worthy affiliations, Truzy's involvement is of very recent vintage and Royster claims no civic participation. McClenahan receives a slight preference. McClenahan's 100% broadcast experience is also superior to that of Spectrum (24.4%). In this connection, past broadcast experience is of only minor significance in comparing applicants for permanent broadcast authorizations. *See Policy Statement*, *supra*, 1 FCC 2d at 396. In summary, Spectrum's 100% minority enhancement and superior female enhancement outweigh McClenahan's edge under the residence, civic involvement and broadcast experience criteria. Therefore, the public interest is served by a grant of Spectrum's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[10] the application of Spectrum Broadcasting Corp. for a construction permit for a new FM Station on Channel 298A in Charlottesville, Virginia IS GRANTED; and the applications of McClenahan Broadcasting, Inc. and Communication Audio Video Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] In addition to McClenahan, Spectrum and CAVC, the following applications were also designated for hearing: Carroll E. Garrison, et al. d/b/a Skyline Broadcasting Company; Rita A. Capobianchi d/b/a Green Valley Broadcasting; Eighty-Ninety Broadcast Group; Timothy FM Limited Partnership; Jefferson Broadcasting Company; College Town Radio Limited Partnership; and KB Communications. The application of College Town Radio Limited Partnership was dismissed by *Order*, FCC 88M-3535, released October 24, 1988. By *Order*, FCC 88M-3728, released November 3, 1988, the Presiding Judge dismissed the applications of Jefferson Broadcasting Company, Eighty-Ninety Broadcast Group, Rita A. Capobianchi d/b/a Green Valley Broadcasting, and Carroll E. Garrison d/b/a Skyline Broadcasting Company. By *Memorandum Opinion and Order*, FCC 89M-1061, the Presiding Judge dismissed the application of Timothy FM Limited Partnership.

[2] The Designation Order included a contingent environmental issue against Spectrum which was deleted. *See MO&O*, FCC 89M-1047, released April 3, 1989.

[3] The burden of proceeding on added issues 1 and 2 was placed on McClenahan. The burden of proof on added issues 1 and 2 was placed on CAVC. The burdens of proceeding and proof on added issues 3 and 4 were placed on CAVC. *See Memorandum Opinion and Order*, FCC 89M-1039, released April 3, 1989.

[4] Ms. Royster testified at hearing that her area of concentration in the law was "primarily labor and employee benefits" (Tr. 355).

[5] Pursuant to a April 30, 1987 letter, discussed under the qualification issues added against CAVC, *infra*, Lindsay R. Barnes and Robert M. Callaghan initially held the 49% non voting stock interest, now held by Jessup.

[6] According to Alonza Gray, Brown told him about the upcoming filing window in 1986 and also told him it would take "[s]omewhere in the neighborhood of 250 to $300,000 for construction for the first months of operation and filing, court hearings" (Tr. 1257). Also, Brown's 1988 financial commitment from Ralph Sampson was for $300,000 (MBI Exs. 31-33), and the May 16, 1989 letter to James Jessup from Sovran Bank was for a $250,000 line of credit.

[7] Barnes first met Brown at a function in 1984 or 1985 and had maintained a friendship since that time (Tr. 563).

[8] The three stockholders hold equity interests as follows: Royster - 35.8%; Lugo - 4.6%, Truzy 4.6%.

[9] CAVC has been disqualified under the basic issues. Assuming that was not the case, CAVC would be the comparative winner. CAVC does not suffer a diversification demerit. It also receives 100% quantitative integration credit. In addition, CAVC receives substantial minority credit, substantial local residence credit and credit for Brown's participation in civic activities. Spectrum's partial female ownership, broadcast experience of Truzy, and slight preference for auxiliary power does not outweigh CAVC's credit for local residence and civic participation.

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-235

In re Applications of

LINDA WARE D/B/A LINDSAY BROADCASTING (hereafter "Ware")	File No. BPH-880504ME
LINDSAY BROADCASTING COMPANY (hereafter "LBC")	File No. BPH-880505MX
CARLOS H. URIBE AND NELLY URIBE D/B/A LINDSAY FM RADIO (hereafter "FM Radio")	File No. BPH-880505OC
CORREIA BROADCASTING, INC. (hereafter "Correia")	File No. BPH-880505PH

For Construction Permit
for a New FM Station on Channel 227A
in Lindsay, California

HEARING DESIGNATION ORDER

Adopted: April 18, 1990; Released: May 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *Air Hazard.* Attempts to obtain FAA clearance with respect to the applications of Ware and Correia through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Ware and Correia would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. *Financial Qualifications.* At Section III of FCC Form 301, each applicant is asked to certify whether or not they have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. LBC and Correia answered "No" to this question. Accordingly, an appropriate issue will be specified against these applicants below.

5. *Correia.* Correia answered "no" to Section V-B, question 11, indicating that its proposal did not provide the required 3.16 mV/m coverage of the community of license. However, staff engineering study of the applicant's maps and other engineering data indicate that 100% of Lindsay will be sufficiently covered. Therefore, the applicant will be required to clarify his response to this question of Form 301.

6. *City Coverage.* 47 C.F.R. § 73.315(a) requires that an application provide a 3.16 mV/m (70 dBu) signal to the entire proposed community of license. FM Radio has indicated that its 70 dBu contour will encompass 96.3% of the proposed community of license, and has requested waiver of 47 C.F.R. § 73.315(a). The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that FM Radio's 3.16 mV/m contour is in substantial compliance with this requirement. Accordingly, no waiver is required, and FM Radio's waiver request will be dismissed as moot.

7. *LBC.* Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. The broadcast interests of one of LBC's two principals, Nicholas Henderson include three applications for FM construction permit for Sacramento, California (BPH-871110MN), Eden Prairie, Minnesota (BPH-871203MC), and Elgin, Texas (BPH-871124MX), all of which have been designated for comparative hearing. *See* the *Hearing Designation Orders* in MM Dockets 89-543, 89-387, and 89-380, respectively. LBC failed to report the designation of these applications. Additionally, LBC failed to report the March 28, 1989 dismissal of its application (File no. BPH-880126ND) for a new FM station in Winton, California. Accordingly, LBC will be required to file an amendment within 30 days of the release of this order, which completely and accurately updates its application with respect to the status of all attributable broadcast interests.

8. *Late-Filed Amendment.* The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment

is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT
Correia	May 12, 1989
	July 12, 1989

9. *Petition to deny*. On June 9, 1988, FM Radio filed a "Petition for Return" of Correia's application. FM Radio's petition to deny is essentially a petition to specify issues. Since the Commission's *Report & Order* in re: *Revised Procedures for the Processing of Contested Broadcast Applications*: *Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in FM Radio's petition have not been considered. Accordingly, an opportunity to raise any allegations therein will be afforded FM Radio post-designation pursuant to 47 C.F.R. § 1.229.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Ware and Correia would constitute a hazard to air navigation.

2. To determine, with respect to Correia and LBC, whether the applicants are financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That, Correia shall file the amendment to Section V-B, question 11, with FCC Form 301, described in paragraph 4, with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That, the Petitions for Leave to Amend filed by Correia IS HEREBY ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. § 73.315(a) filed by FM Radio IS DISMISSED AS MOOT.

15. IT IS FURTHER ORDERED, That, pursuant to paragraph 6 above, LBC will file with the Administrative Law Judge, within 30 days of the release of this Order, an amendment completely and accurately updating the status of its current media interests.

16. IT IS FURTHER ORDERED, That, the Petition for Return of the Correia application filed on June 9, 1988 by FM Radio IS DISMISSED.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That, LBC shall file an amendment clarifying its proposed 3.16 mV/m coverage of Lindsay, California with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paul Ondulich,
Complainant,

v. File No. E-89-239

AT&T Communications, Inc.
Defendant.

ORDER

Adopted: May 16, 1990; Released: May 22, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. The above-referenced formal complaint was filed on June 7, 1989. Pursuant to this Order, we dismiss the matter for failure to state a cause of action upon which relief may be granted.

I. BACKGROUND AND DISCUSSION

2. The complaint recites that Paul Ondulich ("Complainant") on or about June 1, 1987, ordered a certain Dial-It 900 service from the American Telephone and Telegraph Company ("AT&T") known as a Call Count Arrangement in order to conduct a nationwide poll regarding events then affecting the PTL Ministry.[1] The Call Count Arrangement was provided by AT&T pursuant to tariff. Additionally, Complainant and AT&T entered into a billing arrangement whereby AT&T would bill callers on behalf of Complainant for Complainant's services, i.e., for the privilege of voting in Complainant's poll. The complaint recites that this billing arrangement was offered pursuant to contract. *Complaint*, at 2.

3. According to the complaint, two 900 numbers were assigned to complainant, with service to be provided by AT&T beginning at a date and time certain. *Id.* Complainant alleges that AT&T failed to provide the service ordered, stating that, owing to an alleged failure to properly configure circuitry, " . . . callers in approximately half the area of the United States were unable to reach the assigned numbers." *Complaint*, at 3. Additionally, Complainant alleges that AT&T failed to take appropriate remedial action. Complainant claims that AT&T's alleged failure to provide ordered service constitutes a violation of 47 U.S.C. §§ 201(a) and (b) and seeks, *inter alia*, damages pursuant to 47 U.S.C. § 206. *Complaint*, at 4.

4. The allegations set out in the instant formal complaint are similar to those contained in an informal complaint filed by Complainant on October 20, 1987 (File No. IC-88-04508). That informal complaint investigation was closed pending the Bureau's general inquiry into regulatory issues concerning AT&T Dial-It 900 Service and associated Premium Billing Service.[2] Complainant participated in that inquiry by filing comments. Subsequently, the Bureau issued its Dial-It 900 Order on April 12, 1989.[3] In that Order, the Bureau held, *inter alia*, that AT&T Call Count Service was not a basic transmission service regulated pursuant to Title II of the Communications Act but, rather, an enhanced service pursuant to the definition of enhanced service set out in 47 C.F.R. § 64.702(a). Therefore, the Bureau ordered AT&T to detariff Call Count Service.[4] The Bureau also held that AT&T's Premium Billing Service was a third party billing service and not a carrier communications service which should be offered pursuant to tariff. Thus, the Bureau in the Dial-It 900 Order upheld AT&T's practice of providing Premium Billing Service pursuant to contract. Dial-It 900 Order, *supra*, at 3433-3434.

5. Given the Bureau's decision that Dial-It 900 service was not a common carrier service regulated under Title II of the Communications Act, the instant complaint cannot lie. Pursuant to 47 C.F.R. § 1.720(b), complaints must "contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation..." The instant complaint recites alleged failures of AT&T in its provision of Call Count Service to Complainant which failures, according to the complaint, constitute a violation of 47 U.S.C. §§ 201(a) and (b). However, 47 U.S.C. § 201 is addressed exclusively to the provision of carrier communications services and the Bureau's Dial-It 900 Order specifically found that neither AT&T's Call Count Service nor its Premium Billing Service constituted Title II communications service. Thus, even accepting complainant's statement of the facts *arguendo*, it is clear that no violation of the Act or the Commission's Rules has been shown.[5]

II. ORDERING CLAUSE

6. Accordingly, pursuant to Sections 0.291 and 1.728(a) of the Commission's Rules, 47 C.F.R. §§ 0.291; 1.728(a), the above-referenced formal complaint of Paul Ondulich against AT&T Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] AT&T Dial-It 900 Service permits simultaneous calling by a large number of callers to a single telephone number utilizing the telecommunications network. Call Count Arrangements provide two or more 900 numbers each of which corresponds to a subscriber-specified choice, for example, a "yes" or "no" answer to a subscriber's query or poll. *See AT & T 900 Dial - It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3430 (Com. Car. Bur. 1989) ("Dial-It 900 Order").

[2] *See* Letter of Chief, Enforcement Division, Common Carrier Bureau, to Hon. Joseph M. Gaydos (June 10, 1988). The letter was issued in response to a May 2, 1988 letter inquiry from Congressman Gaydos concerning the status of the Ondulich informal complaint.

[3] Dial-It 900 Order, *supra*, at n.1. Complainant was also advised of his right to file a formal complaint pending resolution of the Bureau's inquiry into AT&T Dial-It 900 Service and associated Premium Billing Service. While no such formal complaint was filed prior to release of the Dial-It 900 Order, the instant complaint was filed two months subsequent to release of the Order.

[4] Dial-It 900 Order, *supra*, at 3434. The Bureau also ordered AT&T to provide Call Count service in conformity with Computer III guidelines governing the competitive provision of enhanced services by dominant carriers. *Id.* AT&T subsequently filed a partial rule waiver request seeking exemption from the Commission's Computer III-mandated comparably efficient interconnection (CEI) requirement. The Bureau granted AT&T a temporary waiver pending a decision on the merits of AT&T's waiver proposal. *See* Petition for Waiver of Comparably Efficient Interconnection Requirements of Third Computer Inquiry, *Memorandum Opinion and* Order, 4 FCC Rcd. 7581 (Com. Car. Bur. 1989).

[5] The instant complaint could be construed as a Petition for Reconsideration of the Bureau's Dial-It 900 Order. However, considered as such, the June 7, 1989 complaint clearly falls outside the statutory filing window provided for Petitions for Reconsideration. *See* 47 C.F.R.§§ 1.4(b)(2) and 1.106(f).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-296

In re Applications of

INLET BROADCASTING CO.	File No. BPH-870724MA
MURMAR MEDIA CORPORATION	File No. BPH-870730ME
JERRY W. OAKLEY	File No. BPH-870730MQ

For Construction Permit for
New FM Station, Channel 233A,
Murrells Inlet, South Carolina

Appearances

Eric S. Kravetz on behalf of Inlet Broadcasting Company; *Mark J. Prak* and *Daniel W. Clark* on behalf of Jerry W. Oakley; and *Robert G. Allen* and *Denise B. Moline*, on behalf of MurMar Media Corporation.

DECISION

Adopted: May 9, 1990; Released: May 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN. Board Member BLUMENTHAL Concurring with Statement, in which Board Member ESBENSEN joins.

Board Chairman MARINO:

1. There are three applicants remaining in this proceeding who seek authority to construct a new FM station at Murrells Inlet, South Carolina. The case was tried on the standard comparative issue by Administrative Law Judge Edward J. Kuhlmann (ALJ), who concluded that grant of the application of Inlet Broadcasting Co. (Inlet) would best serve the public interest. *Initial Decision*, 4 FCC Rcd 6760 (1989) (I.D.). The ALJ held specifically that Inlet and Jerry W. Oakley were preferable to Murmar Media Corporation (Murmar) because they proposed 100% quantitative integration compared to Murmar's 40%, and that Inlet was preferred over Oakley because of its superior qualitative enhancements, and because of Oakley's other media interests. *Id.* at para. 29. The proceeding is now before the Review Board on exceptions. We have reviewed the I.D. in light of the exceptions, the oral argument held January 26, 1990, and our examination of the record, and conclude that the ALJ's grant to Inlet should be affirmed.

COMPARATIVE ISSUE

2. The ALJ awarded Inlet, a general partnership with two 50% partners, Robert E. Johnson and Billy J. Wommack, full integration credit. Both Murmar and Oakley challenge this award. Specifically, they argue that Johnson's proposal to be full-time general manager conflicts with an application he filed in his own name, after the Inlet application was filed, for a new FM station at Socastee, South Carolina, where he not only pledged to be general manager but also to divest his interest in Inlet if the Socastee application is granted. In addition to this alleged infirmity, exceptors claim that Johnson has not satisfactorily explained how he would curtail his present farming activities in order to work at the station. Exceptors also dispute Wommack's proposal to be full-time program director and chief engineer on the grounds that Johnson will have the only actual decision-making authority in the partnership, because Wommack's engineering role cannot be viewed as a policy-making one, and because he is obligated to provide engineering services to other broadcast stations. Finally, it is alleged that the Inlet partnership agreement undercuts the permanence of the integration proposals because it contains a mandatory "buy-sell" provision whereby there would be a forced buy-out of one partner by the other after one year.

3. We reject these exceptions. To begin with, there is nothing contingent or uncertain in Johnson's commitment to be full-time general manager in Inlet. Although at one time Johnson did have an integration proposal in the Socastee, South Carolina proceeding, his application there was dismissed by the Mass Media Bureau on June 7, 1988, a full three months prior to September 1, 1988, the date on which the ALJ required integration statements to be filed in the instant proceeding. *See* Oakley Exh. 2; I.D., para. 22. [1] On the latter date, Johnson promised unequivocally to be integrated full-time in Murrells Inlet as general manager. As we expressly held in *Northland Communications*, 100 FCC 2d 914, 915-918 (Rev. Bd. 1985), *rev. denied*, 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F. 2d 774 (D.C. Cir. 1987), an integration proposal will not be deemed contingent if, as here, it is definite and final on the date the parties are required by the ALJ to set forth their proposals. On the key date for integration purposes in this proceeding, no contingency existed pertaining to Johnson's proposal to work full-time at the Murrells Inlet station, and accordingly, his commitment was properly accepted by the ALJ. As to his farming activities, in which he is actively engaged approximately three months a year, Johnson's testimony made clear that he does not depend on farming for his livelihood, that he lives on income from his investments which do not take any of his time in management, and that he will discontinue his farming pursuits if his application is granted. (TR. 48, 51, 53, 91-92, 99). Thus, Johnson has sufficiently shown that he would be free to work full-time at the station. *See Colonial Communications, Inc.*, FCC 90R-20, released March 30, 1990, para. 7. His integration proposal was properly credited by the ALJ.

4. We also reject the exceptors' contention that Mr. Wommack's duties are non-managerial. Wommack proposes to act as the station's program director and chief engineer in which positions he will oversee the station's on-air personnnel and all programming broadcast by the station, and will supervise the station's technical operations. Inlet Exh. 3. These are management responsibil-

ities. Moreover, insofar as Wommack's engineering role is attacked, we have previously recognized that the role of chief engineer, particularly insofar as it involves management duties and supervision of personnel, is entitled to integration credit. *See Phoenix Media Corp.*, 56 RR 2d 1241, 1246-1247 (Rev. Bd. 1984), *rev. denied*, FCC 85-435, released August 6, 1985. As to Wommack's intentions to provide contract engineering services to other stations, he clearly swore in his written exhibit and testified during cross-examination that he would only consider doing so if such activity did not conflict or interfere in any way with his positions at the station, and that if he did any consulting it would be at night and on the weekends. (Inlet Exh. 3, p. 2; Tr. 134, 143-144). We also disagree with the contention that Johnson controls the Inlet partnership and dominates Wommack. To date, both partners have been active in such matters as retaining legal and engineering counsel, obtaining financing, and preparing the application (Tr. 40, 44-45, 97-98, 121, 130), and there is no reason to conclude based on the evidence of their activities that either will not remain active. Finally, in this respect, we disagree with Oakley that the "buy-sell" provision of the Inlet partnership agreement is intended to favor Johnson by permitting him to force Wommack out after one year. The Inlet partnership agreement specifically grants each partner an equal right of first refusal should the other seek to sell his interest, and is intended to protect both partners. Tr. 38. Moreover, contrary to Oakley's characterization, the "buy-sell" provision by its own terms is voluntary, not mandatory, and only permits either partner the option of initiating a written offer to purchase the other partner's share. Inlet Exh. 1, pp. 7-8. Thus, a forced buy-out is neither contemplated nor possible under the terms of the agreement, and there is no adverse impact on Inlet's integration proposal. In sum, we affirm the ALJ's award of full 100% integration credit to Inlet.

5. Oakley, an individual applicant, was, like Inlet, awarded full 100% integration credit by the ALJ. Oakley was seriously demerited, however, because of his minority ownership interests in three companies, Westcom, Tenncom, and Northcom, each of which is the licensee of two broadcast stations in Hickory, North Carolina, Shelbyville, Tennessee, and Enterprise, Alabama, respectively. Oakley also has employment contracts to manage and administer these six stations. I.D., para. 5. The ALJ found that Oakley had failed to make a timely divestiture pledge of these interests and that therefore he was the least favored applicant under the diversification factor. *Id.*, at para. 17. The ALJ noted that the evidence demonstrated that an amendment containing a divestiture pledge was not filed by Oakley until October 7, 1987, whereas the "B cut-off" date for amendments as of right was October 2, 1987. *Id.*, at para. 18. In his exceptions, Oakley argues that his divestiture amendment was timely because an unexecuted copy of the amendment was filed on the October 2, 1987 "B cut-off" date and because the amendment was actually executed on that date, thus showing Oakley's intention to divest at that time. Oakley submits that in these circumstances it is not significant that the conforming, executed copy of the amendment was not filed until October 7, 1987. Oakley Br. at 6-7. We disagree with these exceptions.

6. Initially, we note that this matter has already been resolved adversely to Oakley by the *Hearing Designation Order* (HDO), 3 FCC Rcd 3928, 3929 (1988), which recites as follows:

> MurMar (on April 25, 1988) and Oakley (on October 7, 1987) petitioned for leave to amend their respective applications. The accompanying amendments were filed after October 2, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

The Board is bound by this determination, *see Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966), which plainly precludes Oakley from upgrading his comparative posture by improving his diversification status by means of a late divestiture pledge. Although Oakley argues that the HDO was incorrect, we are not free to review the Bureau's action, which was taken pursuant to delegated authority. *See Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977). Furthermore, the Commission has made clear that it will not accept late-filed upgrading amendments absent a showing of unusual or compelling circumstances or circumstances completely beyond the applicant's control. *Kennebec Valley Television, Inc.*, 3 FCC Rcd 4522 (1988). Here, Oakley has offered no explanation whatever, let alone a compelling one, that would justify his late filing of an executed divestiture amendment. [2] Moreover, even had Oakley's divestiture pledge been timely, the ALJ found that the pledge was undermined by Oakley's continuing contractual arrangement to manage the operation of two of the stations. I.D., para. 19. Oakley contends that this understanding is not specifically enforceable in the local courts. Whatever contractual rights Oakley may possess under state law, however, the ALJ properly held that it was the applicant's burden to establish persuasively on the record that he would have no ongoing significant managerial interest in the stations, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 n. 5 (1965), and that he had not done so. Nevertheless, because of the importance attributed to Oakley's station ownership *per se*, it is unnecessary for us to review these additional findings or to assign weight to Oakley's managerial role as well. Finally, even were Oakley's diversification arguments accepted and his considerable demerit eliminated, he would not prevail over Inlet under the integration analysis. Although both applicants were credited with 100% proposals, Inlet's principals have local community or service area residence whereas Oakley does not. Oakley relies on his broadcast experience, but the Inlet principals also have broadcast experience, albeit of lesser duration. In any event, experience alone, a minor comparative factor, *see Policy Statement*, *supra*, 1 FCC 2d at 396, could not overcome Inlet's preference under the "fundamental . . . public interest consideration" of local residence. *Colonial Communications, Inc.*, *supra*, at para. 9; *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985).

PETITION TO ENLARGE ISSUES

7. On October 10, 1989, Murmar filed a petition to enlarge issues against Inlet which seeks issues to determine whether Inlet partner Robert Johnson misrepresented or lacked candor in connection with a noncompetition agreement and whether that agreement would preclude Johnson from fulfilling his integration commitment to Inlet. In support of its petition, Murmar submits that in the course of discovery it learned that Johnson had sold his interests in Stations WYAK and WYAK-FM, Surfside Beach-Garden City, South Carolina, which is proximate to Murrells Inlet, in 1985, and that its investigation revealed "a reference" to a covenant not to compete between buyer and seller that would run for five years until June 28, 1990. Murmar submits that Inlet improperly failed to disclose this agreement in response to interogatories and that the agreement may impair Johnson's integration commitment.

8. We shall deny this petition. In response to Murmar's allegations, Inlet submitted affidavits of Mr. Johnson and Willard D. Hanna, Jr., the attorney who represented the sellers in the transfer of Station WYAK and WYAK-FM. Both aver that whereas the contract for sale of the stations made reference to a noncompetition agreement, no such agreement was ever entered into or executed and, in fact, the provision in the transfer agreement calling for the noncompetition agreement was waived by the buyer at the June 27, 1985 closing. In light of these sworn statements, which fully refute the bare allegation by Murmar that a noncompetition agreement exists, we find that no substantial or material question of fact regarding either Inlet's representations or its integration proposal have been raised. *See* 47 C.F.R. 1.229(d); *Newton Television Limited*, FCC 90-160, released April 27, 1990, at paras. 5, 22.

FINAL COMPARATIVE SUMMATION

9. Inlet, which is credited with 100% full-time integration, receives a slight integration preference over Oakley because of Inlet's qualitative enhancement superiority. Furthermore, Inlet prevails over Oakley because the latter has a significant diversification demerit. Inlet also enjoys a substantial integration preference over Murmar, which applicant has not excepted to the ALJ's award of only 40% integration credit to it. *See HLD & M Communications*, 93 FCC 2d 143 (Rev. Bd. 1983); *Family Broadcasting Group*, 93 FCC 2d 662 (Rev. Bd. 1983), *rev. denied*, FCC 83-559, released November 29, 1983. In sum, Inlet is the superior comparative applicant, and a grant of Inlet's application would best serve the public interest, convenience, and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the petition to file supplement to reply, filed November 9, 1989, by Inlet Broadcasting Co. IS GRANTED, and the petition for leave to amend, filed January 3, 1990 by Jerry W. Oakley IS GRANTED and the amendment IS ACCEPTED; and

11. IT IS FURTHER ORDERED, That the application of Inlet Broadcasting Co. (File No. BPH-870724MA) for a construction permit for a new FM broadcast station at Murrells Inlet, South Carolina, IS GRANTED, and the applications of Murmar Media Corporation (File No. BPH-870730ME) and Jerry W. Oakley (File No. BPH-870730MQ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] The Bureau dismissed the Socastee application pursuant to 47 C.F.R. §73.3518 because it was inconsistent with the earlier filed Murrells Inlet application since the stations' predicted 1 mV/m contours would overlap in violation of 47 C.F.R. §73.3555(a)(1). *See* Oakley Exh. 2.

[2] Applications and amendments thereto must be duly executed, that is, signed, on the filing date. *See* 47 C.F.R. §73.3513; 47 C.F.R. §73.3522(a)(1); *Policy Re FM Applications*, 58 RR 2d 166, 169 (1985).

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL IN WHICH BOARD MEMBER ERIC T. ESBENSEN JOINS

I reluctantly concur in the award of ownership/management integration credit to Inlet Broadcasting for the proposal of its 50% principal, Robert Johnson.

Shortly after the filing of Inlet's subject application, this same Robert Johnson filed in his own name an application for a new FM station at Socastee, South Carolina, a town not too distant from Murrells Inlet. In that Socastee application, and on the Commission's EEO form (FCC 396-A), Johnson specified that he would be the General Manager of that proposed station. Obviously recognizing that because the signals of the proposed Socastee station and the proposed Murrells Inlet station would overlap in a manner prohibited by the Commission's multiple ownership rules, Johnson's application for Socastee was accompanied by a pledge to "divest [his] interest in Inlet Broadcasting Co.," should his Socastee application be granted.

But noting the prohibited signal overlap between the Socastee application and the previously filed Murrells Inlet application, the Commission rightfully refused to accept and process the conflicting Socastee application. *See William H. Hernstadt*, 56 RR 2d 948 (M.M. Bur. 1984) ("contingent" applications in conflict with multiple ownership rules will not be accepted). Several days later, the Commission designated for hearing the instant applications for Murrells Inlet.

Relying on *Northland Communications*, 100 FCC 2d 914 (1985)(subsequent affirmance omitted), Inlet claims that there were no conflicting integration proposals on file for Johnson at the exhibit exchange date when Johnson "revealed" his General Managership integration proposal in this proceeding, particularly since Johnson's Socastee application had by that point been dismissed by the Commission.

Only because Johnson's Socastee application made clear that his Murrells Inlet application was *contingent*, and his priorities clearly indicated (although not achieved), can I accept his instant integration proposal. *See Metro Broadcasting, Inc.*, 99 FCC 2d 688, 706 (Rev. Bd. 1984)(concurring statement). While it is true that *Northland* held that the exhibit exchange date was the proper time to tender final integration proposals, nothing there held that a flat conflict in integration proposals revealed by *other evidence*, and not qualified by a clear contingency, could *not* be noticed by the Commission. [1] Thus, although under the old regime spelled out in *Northland* an applicant need not have formally proposed integration until the exhibit exchange date, an applicant may disclose a patent conflict in *other* ways. For example, as in this case, Robert Johnson certified in the EEO portion of *both* his Socastee and his Murrells Inlet applications that he would be General Manager of each station. In the recent *Anchor Broadcasting Limited Partnership*, FCC 90R-23, released April 10, 1990, an applicant revealed at deposition and at hearing that her integration pledge there was contingent on whether any one of two other of her applications was granted *first*, a matter the ALJ could not predict.

Again, solely because Robert Johnson clearly indicated that his Socastee application was contingent and spelled out his priorites (even though his priorities were ignored when Socastee was dismissed), do I not find an integration conflict. Had both the Socastee and Murrells Inlet applications been accepted for filing and designated for hearing, with Johnson specified on the two EEO forms as the intended General Manager of *each*, he would have received integration credit in *neither*, since we cannot and will not predict which might have been granted (or settled) first.

FOOTNOTE TO STATEMENT

[1] Responding to the dilemma of "contingent" integration proposals, the Commission has indicated an intent not to recognize them at all in the future. *Revision of Application Form (FCC Form 301)*, 4 FCC Rcd 3853, 3860 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-424

In re Applications of

ASPEN FM, INC.	File No. BPH-850712PH
AJAX MOUNTAIN BROADCASTING CORPORATION	File No. BPH-850712PR

For Construction Permit for New FM Station, Channel 296A, Aspen, Colorado

Appearances

Paul A. Zevnik on behalf of Aspen FM, Inc.; *Howard Liberman* on behalf of Ajax Mountain Broadcasting Corporation; and *Jerry M. Hermele* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: May 14, 1990; Released: May 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. Ajax Mountain Broadcasting Corporation (Ajax) has excepted to the *Initial Decision* (I.D.), 4 FCC Rcd 4642, of Administrative Law Judge Walter C. Miller (ALJ). In his I.D., the ALJ found and concluded that: Ajax falsely certified its financial qualifications in its original application filed July 12, 1985 (*see* 4 FCC Rcd 4643-4644); thus, the ALJ held that Ajax is "not of fit character to be a Commission licensee." If Ajax had been found to be basically qualified, the ALJ also declared that it would have received no credit under the standard comparative issue because "Ajax's application is a classic 'sham' application . . . ." 4 FCC Rcd at 4649. Aspen FM, Inc. (Aspen), the only other remaining applicant in this formerly six-party proceeding, was declared "the winner" by the ALJ for both basic and comparative qualifications reasons. *Id.* For the reasons set out below, we affirm the denial of Ajax's application because under well-established Commission precedent Ajax cannot be found to be financially qualified.

2. *Prejudgment and Bias* : Ajax filed a full fifty page brief supporting its exceptions, and in the first part of its brief registered a "general exception" to the ALJ's alleged "prejudgment" and "obvious bias against Ajax." Ajax argued that "early in the proceeding, [the ALJ] for no justifiable reason, [took] a dislike to Ajax and everyone connected with the applicant, and then proceeded to find fault with virtually everything they did." Ajax Br. 4-13. Aspen replied that Ajax attempted to create a false impression that the ALJ concluded at the outset that Ajax was the "bad guy" and Aspen FM the "good gal". In fact, for much of the hearing this was "a hard fought, six party case", and prior to the commencement of the hearing, financial qualifications and related issues were added against three parties, including Ajax. Aspen also maintained that a review of the hearing transcript revealed that "Ajax, its counsel and principals were treated with respect at least equal to that afforded any other party. *See* especially Tr. 4-305." Aspen Reply, pp.2-4.

3. The Review Board is not the appropriate forum to consider Ajax's complaint about prejudgment and bias of the ALJ. Ajax failed to seek disqualification of the ALJ under the specific procedures provided by the Commission in Section 1.245 of its Rules, 47 C.F.R. §1.245. Section 1.245(b) provides that any party may request that the presiding ALJ withdraw from the case "on grounds of personal bias or other disqualification" by filing with the ALJ "an affidavit setting forth in detail the facts alleged to constitute grounds for his disqualification." Section 1.245(b)(1). If the ALJ does not believe himself to be disqualified, he may file a response and proceed with the hearing. Section 1.245(b)(2). The party seeking disqualification must except to the ruling of non-disqualification "at the time the ruling is made." Section 1.245(b)(3). On the filing of exceptions, the ALJ "shall certify the question" to the Commission, and thereafter: "The Hearing shall be suspended pending a ruling on the question by the Commission." Section 1.245(b)(4). These very specific Commission procedures are designed to implement 5 U.S.C. §556.

4. In another case where an applicant had by-passed the procedures specified by the Commission in Section 1.245 and raised the matter for the first time in its brief and exceptions, we struck exceptions which sought "through the back door to cast serious aspersions on the integrity of the presiding ALJ with undocumented maledictions in a forum in which the ALJ cannot respond." *George E. Cameron, Jr. Communications*, FCC 82R-23, released April 26, 1982, at note 3. Here, that reasoning is fully applicable because Ajax did not utilize the procedures mandated by the Commission's Rules. In essence, the Commission has reserved to itself jurisdiction over such complaints if timely lodged. Consistent with our past precedent, we will *sua sponte* strike Ajax's preliminary statement, containing its general exceptions alleging bias, pp. 4-13. *See also RKO General Inc. (WAXY - FM)*, 4 FCC Rcd 4674, 66 RR 2d 1162, at 1179 (Rev. Bd. 1989).

5. *Ajax's Financial Qualifications* : On July 10, 1985, Sue Ann Todhunter, Ajax's President, certified that "sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue." She also certified that "a reasonable assurance exists that all such sources have sufficient net liquid assets to meet these commitments." *See* FCC Form 301, Section II, Financial Qualifications; 4 FCC Rcd at 4643. Ajax has maintained that her certification was based upon a written agreement entered into on July 9, 1985, between Steven Hubert, an Ajax non-voting stockholder, and the other principals. *Id.*, Ajax Br. 13.

6. In his I.D. the ALJ found that the agreement, on its face, established that "no agreement was entered into between Hubert and Ajax's principals on that day." Thus, the ALJ determined that:

> Judi Francis, Ajax's Vice-President, Secretary, Director, and then 49% voting stockholder, never signed that agreement. She wasn't even present at the July 9, 1985 meeting between Steven Hubert and "Ajax's principals." Moreover, when Mrs. Francis, and the other three Ajax stockholders, finally did sign a Memorandum of Agreement, its terms were substantially different than those contained in the July 9th document. Compare Aspen FM Ex. 30 with ABNI Ex. 33.

In fact, it appeared to the ALJ from Ajax's own documents that the principals of Ajax "never reached a *full* accord, until late April, 1988. *See* Ajax's Ex. 14." *Id.*

7. Next, the ALJ found that, assuming the July 9th agreement had been binding at that time, it did not commit Hubert to provide the entire amount Ajax needed to construct and operate the proposed station. Hubert was to provide the funds in four distinct and specific phases, and he had to expressly approve continuing to the next phase. *Id.* Phase I funding was limited to $18.000, and was intended to fund the Ajax application solely through the acceptance for filing of the application (Aspen Exh. 30, p. 1). Phase II funding was an additional $65,000, which was to be used solely for the purpose of prosecuting the Ajax application (*Id.*). Phase III funding was an additional $250,000, to be used solely for constructing all necessary facilities to operate the Ajax station, and to complete all other start-up requirements in order to begin operations (*Id.*). Phase IV funding was for an additional $350,000, which was to be used solely for maintaining the ongoing operations of the Ajax station (*Id.*). Hubert was not required to advance any funds beyond the $18.000 in Phase I, and his approval was required in order "to proceed with each phase" (*Id.*, Article IV).

8. Finally, the ALJ found that at the time of certification, Hubert never made available a balance sheet or a financial statement establishing "his ready liquity." 4 FCC Rcd at 4643. When this matter was later inquired into, the ALJ found (*id.*):

> In truth, as of July 9, 1985, Hubert did not have the liquidity to make a loan to Ajax. In 1985, Hubert's lines of credit were available solely for real estate investments (Tr. 3209-3213). Moreover, and at no time before May 1988, did Hubert even seek approval to use his credit line at the Maryland National Bank to invest in Ajax (Tr. 3214-3216).

9. The record fully supports these findings. It establishes that a review of the files at Maryland National Bank indicated that the 1985 Hubert credit lines were available *solely* for real estate investments to the Hubert family members, Michael, Ralph and Steven (Tr. 3209). Of the two 1985 lines of credit, one line of credit was available to Steven Hubert alone. The amount of that line of credit was $325,000. As of July 1985, the Steven Hubert credit line was "fully drawn" (Tr. 3210). Thus, no funds were available from that line for Ajax. The second Hubert credit line at Maryland National Bank was in the amount of $1 million, and was available to three members of the Hubert family jointly (Michael, Ralph, and Steven). Any one of the Hubert family members could have drawn down on the 1985 $1 million Maryland National Bank line of credit (Tr. 3212-3213). However, the $1 million line of credit was restricted to use for real estate investments, including specifically "short-term financing at the time for deposits, good faith money, and some short turn around deals," all related to investments in land or buildings (Tr. 3211-3212).

10. Both lines of credit at Maryland National Bank required Hubert to indicate to the bank his intended use of funds before drawing down on either of the lines of credit. The Maryland National Bank loan committee, both in 1985 and currently, requires an explanation from the Huberts in order to assure that the use of funds from the lines of credit is consistent with the loan committee's approval of the credit line (Tr. 3214). At no time prior to May 1988 did Steven Hubert request approval for the use of any credit at Maryland National Bank to provide funds for investing in Ajax (Tr. 3214-3215).

11. When Steven Hubert finally made an inquiry to Maryland National Bank in May 1988, he was informed that, according to the bank's records and according to the bank's intentions, even as of May 1988, the Hubert credit lines were intended solely for real estate investments. Prior to May 1988, if Hubert had inquired, he would have been told that, prior to May 1988, the Maryland National Bank credit lines would not have been available for the Ajax investment. In May 1988, the Maryland National Bank, for the first time, specifically authorized the use of funds from the Hubert lines of credit for the Ajax proposed project (Tr. 3215-3216).

12. As indicated at the outset (*see* para. 1, *supra*), the ALJ resolved the designated *false* financial certification issue against Ajax. In essence, he concluded that Ajax lacked candor and misrepresented facts when Todhunter certified its financial qualifications on July 10, 1985, 4 FCC Rcd at 4644, because at that time the most she knew was that "a possible lender, Steven Hubert, existed and was willing to negotiate a deal in return for 60% equity interest in Ajax." *Id.* Moreover, at the time she certified, Todhunter had "no reasonable assurance that Hubert had sufficient liquid assets to meet his commitments. She'd never seen his balance sheet or financial statement. So she knew nothing about Hubert's ready liquidity." *Id.*

13. Ajax argues in its exceptions, Br. 19-21, that there is no basis in the record for concluding that Todhunter "knowingly misrepresented" the applicant's financial qualifications. It concedes that the record does reveal several defects in its financial qualifications at the time of certification, if measured "under the standards the Commission followed until 1981, when it changed the FCC Form 301 to eliminate full financial showings and substitute instead certification." Br. 19. Nevertheless, it maintains that "the existence of such technicalities [defects] does not mean that Ms. Todhunter engaged in an affirmative misrepresentation." Br. 20. It concedes that "the wording of the four phase commitment permitted Hubert to back out of his commitment," but argues that both Hubert and Todhunter "believed that Mr. Hubert had made a binding commitment for all four phases." Br. 20. Similarly, while the bank's records in fact limited Hubert's line of credit to real estate investments, neither

Hubert or Todhunter knew of such limitation until 1988; thus, Todhunter did not commit a misrepresentation when she certified. Br. 20.

14. Ajax's reliance on its principal's subjective intent to explain away contemporaneous documents to the contrary misses the mark. Our own review of the record and the parties' arguments reveals a narrower and more objective ground for deciding this case. In its exceptions, Br. 21, Ajax relied on the Commission's decision in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). As explained more fully below, we have concluded that resolution of this case is controlled by the financial standards discussed by the Commission in *Northampton*, *supra*. Those standards require "an objective inquiry to determine whether the applicant has 'reasonable assurance' of *committed* sources of funds to construct and operate when initially certifying its application." *See Rebecca L. Boedker*, FCC 90R-30, released May 4, 1990, at para. 15.

15. In resolving the financial qualifications issue which was designated against Ajax, 4 FCC Rcd at 4642, the ALJ reasoned that, "[t]his issue, unlike the false financial certification issue looks forward" so that he was free to look at the applicant's current financial condition. *Id.* at 6. Based upon Ajax's 1988 modification of its financial plans, *id.*, the ALJ concluded that Ajax is financially qualified, 4 FCC Rcd at 4648. The conclusion that the financial issue is forward looking and does not depend on the applicant's financial condition "before" or "at the time" of certification is plain legal error and inconsistent with a long line of Commission and Board cases beginning in 1986 and continuing to the present.

16. In *Shawn Phalen*, FCC 90R-27, released April 20, 1990, para. 4, we followed the Commission's requirements in *Opal Chadwell*, 4 FCC Rcd 1215 (1989), and *Pepper Schultz*, 2 FCC Rcd 1476 (1987), and held that when a financial qualifications issue is designated for hearing "the appropriate inquiry is whether at the time the applicant certified its financial qualifications it has reasonable assurance of the funds necessary to construct and operate its proposed facility." In *Chadwell*, 4 FCC Rcd at 1217, the Commission stated that: " . . . the ALJ would have to examine Chadwell's *original* proposal to determine whether she had a reasonable basis for making it." Earlier, in *Pepper Schultz*, 2 FCC Rcd at 1476 note 1, the Commission had noted (contrary to Ajax's suggestion, para. 13 *supra)* that:

> When the Commission eliminated the detailed financial questions from the application form, it did not intend to change the substantive law concerning financial qualifications. *Revision of Form 301*, 50 RR 2d 381, 382 (1981). The new form specifically requires the applicant to certify that "net liquid assets are on hand or are available from committed sources." FCC Form 301 (January 1982), Section III.

It is significant that in both *Schultz*, 2 FCC Rcd at 1476 n. 1, and *Northampton*, 4 FCC Rcd at 5518, the Commission cited with approval the Board's earlier decision in *Schultz*, 103 FCC 2d 1052, at 1054, 1058-59 (Rev. Bd. 1986), which had pointed out that "at the time" of "certification" Schultz appeared to have had "neither cash resources nor loan commitment."

17. *Northampton* contains the Commission's latest review of the financial qualifications standards which have been applicable since the 1981 revision of FCC Form 301 permitting applicants to certify their qualifications. There the Commission did hold that the reasonable assurance standard governing certification of financial qualification "does not necessarily require contemporaneous written documentation." 4 FCC Rcd at 5518. However, the Commission also cautioned that (*id.*):

> [A] broadcast applicant . . . must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months *before* the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59, §11 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988). Id., para. 13.

When a hearing is ordered on a financial qualifications issue, the Commission indicated that the applicant "must adduce probative evidence" to establish a reasonable assurance at the time of certification. And it explained that (4 FCC Rcd at 5519):

> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. Where the lender is not a financial institution but a person . . . the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time. In such a case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification.

18. Ajax's financial evidence fails to satisfy the Commission's probative evidence test in two vital areas. First, assuming that the July 9, 1985 agreement was binding at the time of certification, its wording establishes, as Ajax concedes, that Hubert was not obliged to provide all of the funds the applicant needed to construct and operate the proposed station for three months. Ajax's self-serving explanation that Hubert *did* intend to fund all four phases of the project is contradicted by the carefully crafted July 9th legal instrument, which included an $18,000 promisory note to be signed by the other principals, and the fact that several substantially different drafts were subsequently exchanged before a final agreement was reached in 1988.

19. A second fatal defect was established by other contemporaneous records. Since Ajax was relying on a lender who was not a financial institution it had to show that, at the time of certification, Hubert had sufficient net liquid assets available to meet his financial commitment to the applicant. Ajax does not dispute that at the time of cer-

tification, Hubert's line of credit could not be used to construct and operate the proposed station. Its explanation that its principals were not aware of that limitation until 1988 may negative an intent to deceive, but it is also establishes that at the time of certification, Hubert did not have the liquid assets on hand to meet his financial commitment to the applicant.

20. Accordingly, the designated financial issue must be resolved against Ajax. This is a basic qualification requirement, 47 U.S.C. 308 (b), and we have often denied applications on financial grounds, based on objective evidence, without reaching the more subjective question of whether there also existed a conscious intent to deceive when the applicant certified. *See e.g., Marlin Broadcast of Central Florida, Inc.*, 4 FCC 7945, 7948 (Rev. Bd. 1989), *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985). This approach seems especially appropriate in this case because Ajax has practically conceded the fatal financial defects at the time of certification, but has strongly disputed the findings of intent to deceive.

21. *Aspen Basic Qualifications* : After concluding that Aspen was basically qualified, and that Ajax was not, the ALJ recommended a grant of Aspen's application. 4 FCC Rcd at 4649. Ajax argues that the ALJ erred in not designating issues with respect to Aspen concerning its financial qualifications and site availability. Although Ajax did not comment when the request for a financial issue was considered by the ALJ, it now argues that the ALJ was biased and prejudiced when he denied another applicant's motion to add a financial issue against Aspen, but did add similar issues against Ajax. (Br. 30-31). The other applicant's motion was denied by the ALJ because it was late filed and did not satisfy the Commission's strict decisionally-significant standards. *See Memorandum Opinion and Order*, FCC 88M-217, released January 29, 1988. Additionally, the ALJ found that, based upon Aspen's rather complete financial showing, it was financially qualified and had not misrepresented its financial qualifications to the Commission. *Id.*, at para. 7. More specifically, the ALJ found (*id.*, at paras. 8-9; footnotes omitted):

> When [Aspen's] President, Martha Tapias certified to FM's financial qualifications on July 11, 1985, she had the following documents to rely on: (a) a written estimate of the costs to construct and operate the proposed FM station for three months without revenue; (b) a loan commitment from the Tokai Bank of California for $350,000 and dated July 10, 1985; (c) a loan agreement (convertible debenture) for $65,250 from the Wilkinson Capital Corporation dated July 11, 1985; and (d) an Equipment Proposal and Financing Commitment Letter prepared for Martha Tapias by the Harris Corporation on July 10, 1985.
>
> ABNI claims these documents are not good enough. That claim is rejected. When those documents are analyzed in conjunction with the Declarations of Martha Tapias and Cynthia Chardonnay, both dated July 11, 1988; the January 8, 1988 Declarations of Rudolph I. Estrada; and the deposition testimony of Ms. Tapias and Chardonnay, they demonstrate that at the time Martha Tapias certified that FM was financially qualified, she had a reasonable assurance it was so; moreover, with written loan commitments for in excess of $483,000, it is reasonable to conclude that FM is financially qualified.

22. The record supports the ALJ's ruling, and Aspen's Reply (at p. 19), that "[t]he suggestion that bias and prejudice rather than evidence was the deciding criterion in adding the financial issue against Ajax and not adding such an issue against Aspen FM is patently absurd." Ajax did not produce its July 9th agreement on which it relied to establish its qualifications until two months after the ALJ had added the financial issue. On the other hand, Aspen put all of its evidence before the ALJ when the financial issue was first sought.

23. Ajax did seek a site issue not only against Aspen but also three other applicants in the proceeding. Br. 35. All four applicants proposed to use sites on Red Mountain on land owned by the Forest Service, and the four applicants filed a Joint Opposition on December 1, 1987, indicating that:

> 1. The Red Mountain site is an existing, dedicated electronic site that is used by existing communications facilities, including an FM translator station. Furthermore, the Red Mountain site is one of the "preferred alternatives" of the Forest Service for future electronic uses in the Aspen area.
>
> 2. All four applicants received letters from the Forest Service providing reasonable assurance of the availability of the Red Mountain site.
>
> 3. The Forest Service -- which controls the site -- will not consider an application for use of the Red Mountain site until *after* a construction permit is awarded, a concrete proposal is advanced, and an application for a special use permit filed. All of the Opponents (except Aspen) specified a tower in excess of 50 feet, but the Aspen Ranger District has stated that all special use permits are handled on a case-by-case basis and that there might be circumstances under which a tower of 50 feet would be approved.
>
> 4. The Aspen/Pitkin County Planning Office has stated that "radio transmission facilites are an allowed use" on Red Mountain and that John Dady's affidavit is *not* a determination *or even a basis* for a determination on the use or availability of the Red Mountain site.
>
> 5. Sections 1.1306 and 1.1307(b) of the Commission's Rules provide that where there are existing broadcast users at a site, an environmental impact analysis will *not* be required except in cases of excess radiation endangering human health and safety. Here, there is an existing broadcast antenna at the site proposed by the four applicants. Therefore, no environmental issue can be designated. Moreover, the Opponents' proposal will not create any "visual blight" in the area.

In his *Memorandum Opinion and Order*, FCC 87M-3290, released December 16, 1987, the ALJ found that Ajax had failed to satisfy 47 C.F.R. §1.229(d), which requires "specific allegations of fact sufficient to support the action requested" and that its four opponents had in fact "shown that they have a reasonable assurance that their Red Mountain sites are both available and suitable, and that no reason exists for adding the environmental issue Ajax has requested." The ALJ's ruling is supported by the substantial record before him and solid precedent. *See*

Arizona Number One Radio, Inc., 103 FCC 2d 552 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 44 (1987), *aff'd sub nom. Interstate Broadcasting System of Arizona, Inc. v. FCC*, 836 F.2d 1408 (D.C. Cir. 1988); and *Alden Communications Corp.*, 64 RR 2d 1612, 1614 (1988) ("Where an applicant is dealing with a government agency that is unwilling or unable to make less than a legally binding commitment, and where the record contains no explicit rejection of the applicant's proposal, a mere willingness by the government agency to entertain a request for use of the land in question is sufficient to provide reasonable assurance of the site's availability"). We will therefore affirm (1) the ALJ's grant of Aspen application, and (2) his denial of Ajax's application for the reasons set out above.

24. ACCORDINGLY, IT IS ORDERED, That the application of Aspen FM, Inc., (BPH-850712PH) IS GRANTED; and that the application of Ajax Mountain Broadcasting Corporation (File No. BPH-850712PR), IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] The Board Chairman elected to temporarily hold this case in abeyance because of controversy generated in other proceedings involving similar financial disputes. *See e.g. Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990), and FCC 90R-27, released April 20, 1990; and *Global Information Technologies, Inc.*, 5 FCC Rcd, 535 (Rev. Bd. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-66

In re Applications of

BEACH BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870730ML
BADEAN MEDIA FM LIMITED PARTNERSHIP	File No. BPH-870730MM
MANUEL LIMA	File No. BPH-870730MP

For Construction Permit for
a New FM Station on Channel 233A
in Long Beach, Mississippi

Appearances

William E. Zimsky, on behalf of Beach Broadcasting Limited Partnership; *Thomas A. Hart, Jr.*, on behalf of Badean Media FM Limited Partnership; *Robert A. Marmet*, and *Harold K. McCombs, Jr.*, on behalf of Manuel Lima; and *Robert Zauner*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: May 15, 1990; Released: May 22, 1990

I. PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, DA 89-273, released March 20, 1989, the Commission designated the captioned applications, along with others subsequently dismissed, for hearing upon the following issues:

> 1. If a final environmental impact statement is issued with respect to Lima in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Sections 1.301-319.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. By *Order*, FCC 89M-1589, released June 5, 1989, the contingent environmental issue specified against Lima was deleted.

3. A prehearing conference was held on May 23, 1989. Hearing was held on September 19, 1989, and the record was closed. Proposed findings of fact and conclusions of law were filed by the parties on October 23, 1989 and reply proposed findings were filed November 3, 1989.

II. FINDINGS OF FACT

Beach Broadcasting Limited Partnership

4. Beach Broadcasting Limited Partnership ("Beach") is a limited partnership organized under the laws of the State of Mississippi. Mr. Stanley Daniels, the sole general partner, owns a 25% interest in the partnership. The limited partners, who each own a 25% interest in Beach, are: William T. Abbott, Lynn Cole and Mark J. Davis. (Beach Ex. 1; Tr. 128).

5. Beach certified that no limited partner will be involved in any material respect in the management or operation of the proposed station. (Beach Ex. 1). Its Limited Partnership Agreement provides, in Section 14, that "No new General or Limited Partners will be admitted to the partnership without the written consent of all General Partners and Limited Partners as to both the admission and the terms on which the new General Partner or limited partner is admitted." In addition, Section 15 of that Agreement provides that "Without the written consent of all General and Limited Partners, no General Partner will assign, mortgage or give a security interest in his partnership interest." (Beach Ex. 1, Attachment A, Page 3).

6. Stanley Daniels, a black male, will be the full-time General Manager of the proposed station. (Beach Ex. 3 at 1). His duties will include general responsibility, oversight, and supervision of overall day-to-day operations of the station including the station's financing. He will be responsible for the hiring, firing, and supervision of all station department heads and personnel. He will formulate and implement station policy regarding programming, sales, engineering, public affairs, community service activities and promotions.

7. Mr. Daniels will work at the station a minimum 40 hours per week as the General Manager. He will hold no outside employment. Mr. Daniels currently owns, as a sole proprietor, a real estate company, Daniels Real Estate. He will divest his interest in this company in the event that Beach receives a construction permit prior to commencement of program test authority. (*Id.*; Tr. 78).

8. Since 1953, except for the period September 1971 to May 1972, while in Florida away at college, Mr. Daniels has lived in either Gulfport or Biloxi, Mississippi, within the service area of Beach's proposed station. Mr. Daniels currently resides in Gulfport, Mississippi. (Beach Ex. 3, pp. 1-2).

9. For the past 11 years, Mr. Daniels has given an average of nine or ten presentations to school children during a given school year. The theme of his talks to these young people is the importance of self-esteem, self-confidence and a positive attitude. (Beach Ex. 3). Also for the past two years, Mr. Daniels has conducted group

discussions and held informal talks with the juveniles being held at the Harrison County Family Court, Juvenile Lockdown, located in Gulfport.

10. Mr. Daniels was one of the founders and on the Board of Directors of the Gulfport East Merchants Association from 1979-1981. The Gulfport East Merchants Association was formed to encourage orderly business development in East Gulfport. In 1981, the Gulfport East Merchants Association merged with the Gulfport Merchants Association. Mr. Daniels attended and participated in meetings of the Gulfport Merchants Association from 1981-1983.

11. Mr. Daniels was active in an effort to construct the first public swimming pool in Gulfport. He brought the project to the Gulfport City Council in 1986 and attended various meetings related to this project. (Beach Ex. 3). His efforts lasted over a three year period and included locating land for the pool, meeting with builders to plan construction, meeting with local business people to discuss funding, eliciting support for the project in the community, and discussing the project with city officials. Ultimately, the City Council decided to pursue another approach and obtained a city pool by purchasing the YMCA, which has a pool.

12. Mr. Daniels has been a member of the NAACP, Gulfport Branch, since the 1960's. He attends and participates in the monthly meetings.

13. In 1987, Mr. Daniels brought the problem of youth gangs to the attention of the Gulfport City Council. (Beach Ex. 3 at 4). Mr. Daniels first contacted the Superintendent of Education regarding the gang problem. (Tr. 111-12). The Superintendent requested Mr. Daniels' assistance in combating the problem. Mr. Daniels then took the matter to the City Council, and the Council formed an Anti-Gang Task Force in January 1988. (Beach Ex. 3). The Task Force held monthly meetings throughout the community, and Mr. Daniels attended and participated in many of these meetings. In early 1989, the Task Force made recommendations to combat the problem.

14. Since 1973 through the present, Mr. Daniels has helped organize at least ten election forums within the service area of his proposed station. These forums consist of local political candidates meeting with the voters to discuss the issues. He served as a Moderator at several of these forums.

15. Mr. Daniels has been active in the Hansboro Civic Club since 1978. The Hansboro Civic Club consists of residents of Hansboro, a neighborhood located in east Gulfport. The Club address various local problems such as crime and neighborhood watch program, zoning and development, local elections, and street repair.

16. Mr. Daniels has been involved with the Southern Christian Leadership Council (SCLC), Gulf Coast Chapter, since the late 1970's. The local chapter of the SCLC is devoted to promoting civil rights for all the people on the Mississippi Gulf Coast, including Long Beach, Gulfport and Biloxi. He attends and participates in meetings of the SCLC and in various programs sponsored by the local chapter within the service area of his proposed station. Mr. Daniels advised the local chapter regarding publicity and media relations.

17. Mr. Daniels has been a judge at the "Tops in Blue" talent contest held at the Keesler Air Force Base in Biloxi. This is a talent contest for military personnel stationed throughout the southeastern United States. Mr. Daniels was a judge for the contest in 1985, 1986, and 1988.

18. Mr. Daniels has assisted in running a cub scout group since September 1988. He also assists in coaching an elementary school football team.

19. From 1973 to 1978, Mr. Daniels was a Sales Representative, and from 1976 to 1978, the Program Director, at WTAM-FM, Gulfport, Mississippi. From December 1981 to December 1982, he was an Announcer at WQID-FM, Biloxi, Mississippi. From January 1985 to July 1989, Daniels was a Sales Representative at WQFX(AM), Gulfport, Mississippi, and became the Promotions Director there in July 1989.

20. Neither Beach nor Stanley Daniels, its sole general partner, has any interest in any broadcast radio or television station, cable television system, newspaper, or other medium of mass communications, other than Beach's present application for a new radio station at Gulfport. (Beach Ex. 2).

21. Beach will install auxiliary power equipment. (Beach Ex. 4).

Badean Media FM Limited Partnership

22. Badean's direct case exhibits were rejected by the presiding officer. (Tr. 44-45).

Manuel Lima

23. Manuel Lima is an individual applicant. He is Hispanic and is a U.S. citizen. He will be integrated full-time (at least 40 hours per week) into the day-to-day operation of the proposed station, as General Manager. He will supervise the overall operation of the proposed station exercising exclusive licensee responsibility for the station. (Lima Ex. 2).

24. Lima resides in Gulfport, Mississippi, and will continue to reside there after a grant of his construction permit. His residence is located in the unincorporated area of Harrison County within the predicted 3.16 mV/m contour of his proposed station. Lima has resided in the proposed coverage area since 1970. (Lima Ex. 1).

25. In 1966, while still a college student, Lima began work as a disc jockey at a radio station in Homestead, Florida (WIII). From there, Lima worked as a disc jockey and producer in Miami, Miami Beach and Fort Lauderdale, Florida radio stations (then WOAH, WKAT, WAEZ(FM), WGOS(FM) and WGMA), until 1970, when he moved to the Mississippi Gulf Coast to assume the position of Program Director of WVMI, Biloxi, Mississippi. He served as WVMI Program Director until 1974. (Lima Ex. 3).

26. In 1974, Lima became Program Director of WQID(FM), Biloxi, Mississippi, the sister FM station of WVMI. Lima served as WQID Program Director from 1974 to 1980. As Program Director, Lima supervised the programming staff and implemented program policies of the station (i.e. format, news, ascertainment, development of non-entertainment programming, etc.) During this time, he produced and hosted a Public Affairs program on the station. (Lima Ex. 3).

27. In 1976, Lima also became the Operations Manager for both WVMI and WQID, a position he held until 1987. (Lima Ex. 3).

28. In addition to his duties at WVMI/WQID, Lima served as programming consultant for WNSL, Laurel; WOKK, Meridian, and WYIG, Jackson, Mississippi. As a consultant, Lima would set up and help the program directors at these stations with a music format structure and its execution. He ceased being a consultant in 1984. He also served as a director and an eight percent shareholder of the licensee of WNSL, from 1983-1987, involving himself with the long-range direction of the station and its effect on financial statements. (Lima Ex. 3, pp. 3-4; Tr. 206-08).

29. In November 1987, Lima became the Vice President and General Manager of WKNN(FM), Pascagoula, Mississippi, and WPMO(AM), Pascagoula-Moss Point, Mississippi, where he is currently employed. Radio stations WKNN(FM) and WPMO(AM) serve the same radio market as the proposed Long Beach, Mississippi, station. (Lima Ex. 3). Although he proposes to work full-time at the Long Beach station, Lima did not propose to terminate his current employment until he filed his Integration Statement in this proceeding in June 1989.

30. To some unspecified extent, and over some unspecified time, Lima has worked with local Civil Defense officials in coordinating emergency communications during hurricanes. (Lima Ex. 3).

31. In 1982, Lima became a partner in The Production Company, Biloxi, Mississippi, where he was responsible for overall sales and marketing campaigns. The company sold and produced radio commercials for the local market as well as outside the market. Lima's association with The Production Company terminated in 1987.

32. For some unspecified time, Lima worked with Jhan Hiber Associates, on diary analysis and music testing for the market, implementing focus group testing.

33. From 1980 to 1988, Lima was an owner of Qualitech Business Computers, Inc., Gulfport, Mississippi, which developed computer applications for the work place. This included application of computers to radio station needs in sales, research, programming and traffic.

34. At some time within the past eight years, Lima has been involved in the construction and purchase of new transmission systems for WQID and WNSL. This involvement included approving budgets and specifications, and the planning and development of broadcast equipment. It also included supervision of an Engineering Department and communication with major equipment suppliers.

35. In 1976, Lima founded the first Boy Scout Explorer Post for broadcasting in Mississippi, located in Biloxi, Mississippi. As advisor to over 20 teenagers, Lima was responsible for setting up the programs and developing community projects. (Lima Ex. 4).

36. In 1977, Lima was appointed to serve on the Radio Advisory Board of the Mississippi Gulf Coast Community College, Gulfport, Mississippi, a position he still holds today. In this capacity, he approves equipment budgets; recommends curriculum changes; lectures to radio students, and suggests ways in which the Radio Department can better meet the needs of broadcasters.

37. For the past seven years, Lima has also served as a voting Member of the Board of Trustees of Mississippi Gulf Coast Community College. He approves and manages the scholarship program and recommends ways to increase scholarship funding.

38. In 1984, Lima helped organize and produce the first Radiothon on the Mississippi Gulf Coast to benefit St. Jude's Children's Research Hospital. Lima also worked with the handicapped children at the South Mississippi Retardation Center, Long Beach, Mississippi, heading up, for two consecutive years, a special fund-raising Easter project. (Lima Ex. 4, p. 3)

39. Lima is a member of his church and served as a Lector at St. Joseph's Church, Gulfport, Mississippi, for six years (approximately 1980-86). He participated in numerous fund-raising activities, including maintaining booths at the annual church bazaars at both St. Joseph's and St. James, also located in Gulfport. Lima has served as Career Day Advisor for Long Beach High School, and was instrumental in developing a computer science program for St. John High School in Gulfport.

40. Over some period of time, Lima became involved to some extent with the Children's International Summer Village and the Up With People programs. On several occasions he has hosted children and young adults from a variety of different states and countries in his home.

41. At some time, Lima established fund-raisers for the Mississippi Parks and Recreation Department, Pat Harrison Waterway District. He serves on the Board of Directors of the Mississippi Coast Crimestoppers, Inc., based in Gulfport, Mississippi. In the Crimestoppers organization, he has served as Publicity Chairman for the past two years, and he is also the Co-Chairman of the "Officer of the Month" Committee. (Lima Ex. 4, p. 4)

42. Lima serves on the Board of Directors of the Gulf Coast Ad Club, based in Gulfport, Mississippi, where he is Chairman of the Legislative Committee. He is a member of the Radio Board of the Mississippi Association of Broadcasters. He also served as Chairman of the 1988 and 1989 Mississippi Association of Broadcasters' Southern District meetings.

43. Lima is a member of the Communications Committee of the Mississippi Coast Chamber of Commerce. He is the head of marketing and as such he is responsible for the long-range marketing of the new consolidated Chamber, which now covers Long Beach, Gulfport, Biloxi, Orange Grove and Pass Christian. (Lima Ex. 4, p. 4)

44. Lima will install auxiliary power equipment. (Lima Ex. 6).

Comparative Coverage

45. The following are the total areas and populations that the applicants will cover within their respective 1 mV/m contours (Joint Exhibit Table II):

Applicant	Population	Area (Sq. km.)
Beach Broadcasting Limited Partnership	164,356	1,860 sq. km.
Badean Media FM Limited Partnership	149,184	1,846 sq. km.
Manuel Lima	134,388	1,248 sq. km.

46. All proposed service (1 mV/m) areas presently receive at least five other primary aural services during daytime and nighttime hours. (Joint Exhibit p. 4).

III. CONCLUSIONS OF LAW

47. Neither Beach nor any of its principals has any attributable interest in any medium of mass communications, and this applicant receives no diversification demerit. Lima will be assessed a moderate diversification demerit for Mr. Lima's position as the General Manager of WKNN(FM) Pascagoula and WPMO(AM), Pascagoula-Moss Point.

48. The cut-off for divestiture commitments for diversification purposes is the date for filing amendments as of right. *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 64 RR 2d 1125. The deadline for filing amendments as of right in this proceeding was October 14, 1987. Mr. Lima did not commit to terminate his position as the General Manager of WKNN(FM) and WPMO(AM) until he filed his Integration Statement in June 1989. That pledge cannot be credited for diversification purposes.

49. Although Lima made a divestiture pledge in his Integration Statement, he claims that it was not necessary for him to make such a pledge in his application in order to avoid a diversification demerit. Lima argues that the Commission's multiple ownership rules and cross-interest policy (which he appears to suggest are self-executing) "would preclude Lima from continuing his employment at WKNN and WPMO . . . if he obtains a construction permit for the facilities proposed in his application." According to Lima, this result follows from the fact that stations WPMO and WKNN(FM) serve the same radio market as the proposed Long Beach station. Lima's argument is that the mere existence of the Commission's multiple ownership rules and cross-interest policy somehow invested Lima with a pre-existing intention to divest. That pre-existing intention, claims Lima, made it "unnecessary for him to make any kind of 'divestiture commitment' in his application." Lima cites no authority for that proposition. In the view of the presiding officer, Lima's intention to terminate his association with WPMO and WKNN(FM), if that intention existed at all, could and should have been expressed in a timely made, straightforward divestiture commitment.

50. Beach receives 100% quantitative integration credit for the proposal of Stanley Daniels to be the full-time General Manager of the proposed station. The integration proposal is substantially enhanced by Mr. Daniels' minority status, his long time residence in the service area of the proposed station, and his participation in civic activities there. The proposal is also enhanced very slightly by Mr. Daniels' broadcast experience, and enhanced very slightly by the commitment to utilize auxiliary power.

51. Badean receives no integration credit. Manual Lima is entitled to 100% quantitative integration credit for Mr. Lima's proposal to be the full-time General Manager of the station. The proposal is substantially enhanced by Mr. Lima's minority status, his service area residency and his participation in civic activities there. Lima's broadcast experience enhances the integration proposal to a slight degree, and the promise to utilize auxiliary power enhances the proposal very slightly.

Comparative Coverage

52. Where the areas and populations within the applicants' proposed coverage areas are already well-served, the Commission has awarded a slight coverage preference only to those applicants proposing substantially greater overall coverage than their competitors. *See, Simon Geller*, 90 FCC 2d 250, 268-69, 276 (1982), where a slight preference was awarded to an applicant proposing to serve four times more area and 315,000 more people than its competitor. Where the differences in service are less significant, only a very slight preference has been awarded. *See, Cotton Broadcasting Company*, 104 FCC 2d 473, 477 (1986), wherein the Review Board awarded a very slight preference for a difference of 118,000 persons (7.5%). Where the differences are insignificant, no preference is warranted. *See, Metro Broadcasting, Inc.*, 99 FCC 2d 688, 699 (Rev. Bd. 1984), difference of 32,570 persons (2%); and *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-63 (Rev. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979, difference of 12,000 persons (5%).

53. In the instant case, the populations each of the applicants would serve is nearly identical, with Beach proposing to serve 30,000 more persons than Lima, not enough to warrant a coverage preference. As between Badean and Beach, no preference will be awarded for a difference in service of 15,000 persons. In sum, no coverage preference is awarded to any applicant.

IV. ULTIMATE CONCLUSIONS

54. Beach is the superior applicant. It has no diversification demerits and receives 100% full-time quantitative integration credit. Badean receives no integration credit and is therefore comparatively inferior to both Lima and Beach. Lima suffers a moderate diversification demerit, and Beach's qualitative enhancements are greater than those due Lima. Particularly, Beach's Mr. Daniels has lived in the proposed service area since 1953, a period of 34 years prior to filing his application. Mr. Lima has lived in the service area since 1970, a period of 17 years since filing his application. Additionally, Lima failed to present evidence regarding the duration of his participation in certain claimed civic activities, thereby diminishing the credit awarded for these activities. Lima receives greater credit than does Beach for broadcast experience, but this does not affect the overall qualitative balance.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Beach Broadcasting Limited Partnership IS GRANTED; and the applications of Badean Media FM Limited Partnership and Manuel Lima ARE DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 22, 1990

CINCINNATI BELL TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On May 4, 1990, Cincinnati Bell Telephone Company filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. Parties may file comments on the proposed revisions to the cost manual no later than **June 15, 1990.** Replies should be filed by **June 29, 1990.** Comments should reference AAD 90-17. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THE TELLESIS PARTNERS — File No. 04660-CL-AL-1-90

For assignment of the construction permit for station KNKN 285 to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the North Dakota 1 - Divide, RSA (No. 580)

MOUNTAIN VIEW CELLULAR PARTNERS — File No. 04812-CL-AL-1-90

For assignment of the construction permit for station KNKN 306 to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Idaho 6 - Clark, RSA (No. 393)

ORDER

Adopted: May 17, 1990; Released: May 22, 1990

By the Chief, Mobile Services Division:

1. Mountain View Cellular Partners (Mountain View) has filed a request for an extension of time to file its response to a "Petition for Reconsideration and Request for Order to Show Cause Why Construction Permits Should Not be Revoked " filed by Optima Cellular Partnership (Optima). Optima has interposed an opposition to the requested extension of time.

2. The Optima Petition was filed on April 13, 1990 and a response was initially due on April 26. However, Mountain View was granted an extension of time until May 17, 1990 to file its response. Mountain now seeks an additional extension until June 4, 1990. In support of its new request Mountain View states that it has new counsel who was recently retained and, although the new counsel represents another partnership which was the subject of a similar Optima petition, the allegations against Mountain View must be evaluated on their own merits. The allegations against Mountain View involve questions of undisclosed partners and alien partners. Mountain View states that its counsel needs additional time to gather the information needed to effectively respond to the allegations and notes that it has over 20 partners who live all across the country.

3. In its opposition Optima points out that Mountain View's new counsel is already familiar with the issues raised in this proceeding because they are substantially the same as those raised in another proceeding (Tellesis) in which the same counsel is involved. Moreover, in the Tellesis proceeding an extension of time was granted and counsel did not require all the time requested. Optima does not believe that Mountain View has justified the extension of time it now requests. Optima further indicates that it had verbally consented to an extension of five days until May 22 during discussions with Mountain View's counsel who, at that time, was seeking an extension until June 8 rather than the June 4 date now requested.

4. We will grant an extension of time but not to the full extent of Mountain View's request. We find that good cause exists for extending the time to respond to the Petition until May 30, 1990. We do not anticipate that there will be any additional extensions granted to respond to the Optima Petition. We also urge both parties to make every effort to resolve procedural disagreements between themselves and refrain from burdening the Commission with disputes of this nature in the future.

FEDERAL COMMUNICATION COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SIERRA CELLULAR PARTNERS — File No. 10456-CL-CP-89

Construction permit for station KNKN 378 to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Missouri 13 - Washington, RSA (No. 516)

MOJAVE CELLULAR PARTNERS — File No. 10150-CL-CP-88

Construction permit for station KNKN 431 to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Montana 6 - Deer Lodge, RSA (No. 528)

ORDER

Adopted: May 17, 1990; Released: May 22, 1990

By the Chief, Mobile Services Division:

1. Mojave Cellular Partners (Mojave) has filed a request for an extension of time to file its response to a "Request for Order to Show Cause Why Construction Permits Should Not be Revoked" filed by Optima Cellular Partnership (Optima). Optima has interposed an opposition to the requested extension of time.

2. The Optima Petition was filed on April 18, 1990, and a response was initially due May 2. However, Mojave was granted an extension of time until May 17 to file its response. Mojave now seeks an additional extension until June 4, 1990. In support of its request Mojave states that it has new counsel who was recently retained and, although the new counsel represents another partnership which was the subject of a similar Optima petition, the allegations against Mojave must be evaluated on their own merits. The allegations against Mojave involve questions of undisclosed partners and alien partners. Mojave states that its counsel needs additional time to gather the information needed to effectively respond to the allegations and notes that it has over 15 partners who, presumably, must all be contacted.

3. In its opposition Optima points out that Mojave's new counsel is already familiar with the issues raised in the proceeding because they are substantially the same as those raised in another proceeding (Tellesis) in which the same counsel is involved. Moreover, in the Tellesis proceeding an extension of time was granted and counsel did not require all the time that had been requested. Optima does not believe that Mojave has justified the extension of time it now requests. Optima further indicates that it had verbally consented to an extension of five days until May 22 during a discussion with Mojave's counsel who, at that time, was seeking an extension until June 8 rather than the June 4 date now requested.

4. We will grant an extension of time but not to the full extent of Mojave's request. We find that good cause exists for extending the time to respond until May 30, 1990. We do not anticipate that there will be any additional extensions granted to respond to the Optima Petition. We also urge both parties to make every effort to resolve procedural disagreements between themselves and refrain from burdening the Commission with disputes of this nature in the future.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-244

In re Applications of

REBECCA RADIO OF MARCO	File No. BPH-850711OB
EMERALD SEA BROADCASTING, INC.	File No. BPH-850712OF
AFFIRMATIVE BROADCASTING CORPORATION	File No. BPH-850712TX
SHOWCASE COMMUNICATIONS, INC.	File No. BPH-850712UB
MARCO MINORITY ASSOCIATES	File No. BPH-850712UA
SUSAN G. & WILLIAM R. GASTON	File No. BPH-850712UE
MARCO SKYWAVE, INC.	File No. BPH-850712UH

For Construction Permit for
New FM Station, Channel 224A,
Marco, Florida

ORDER

Adopted: May 14, 1990; Released: May 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On April 30, 1990, Rowland Gulf Radio, Inc., filed with the Review Board a Petition for Leave to Intervene and Request for Waiver, as well as a Motion to Condition Construction Permit and Request for Other Relief. Identical pleadings were filed with the Presiding Officer in this proceeding and with the Commission.

2. By *Order*, FCC 90I-38, released May 10, 1990, the Commission's Office of General Counsel, pursuant to 47 C.F.R. §0.251(f), dismissed both pleadings, and therein indicated (at fn. 6) that the identical pleadings pending before the Board "are hereby rendered moot."

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Condition Construction Permit and Request for Other Relief, as well as the Petition for Leave to Intervene and Request for Waiver, filed April 30, 1990, by Rowland Gulf Radio, Inc., ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-215

In the Matter of

Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses

ORDER

Adopted: May 17, 1990; Released: May 18, 1990

By the Chief, Common Carrier Bureau:

1. On April 10, 1990, the Commission released a *Notice of Proposed Rule Making* in which it proposed to eliminate Account 6124, General Purpose Computers Expense, and Account 6724, Information Management.[1] Interested parties were given until May 10, 1990, to file comments. On May 3, 1990, the Missouri Public Service Commission (MoPSC) and the Arkansas Public Service Commission (ArkPSC) filed a motion concurring with the motion of several other parties[2] which requested that the time for filing initial comments in this proceeding be extended to June 22, 1990. On May 4, 1990, United States Telephone Association (USTA) and the Michigan Public Service Commission (Michigan PSC) also filed comments supporting an extension of time until at least June 22, 1990 within which to file comments. On May 9, 1990, the Deputy Bureau Chief, Common Carrier Bureau denied the motion for an extension of time filed by the parties listed in footnote 2, concluding that they have had sufficient time to study the effects of the Commission's proposed rule change.[3]

2. The concurring motions filed by MoPSC and ArkPSC, USTA and the Michigan PSC basically cite the same reasons for an extension of time as were given in the motion that the Deputy Bureau Chief denied on May 9, 1990. However, the MoPSC and ArkPSC motion also requests that the reply comment period be extended until August 22, 1990, and that this proceeding be referred to a Federal-State Joint Board if the comments show that the proposal will have "significant effects" on jurisdictional separations.

3. MoPSC and ArkPSC state that extending the reply comment deadline until August 22, 1990 will allow the states to address this issue at the National Association of Regulatory Utility Commissioners (NARUC) meeting in Los Angeles in July 1990. The Michigan PSC also cites the NARUC meeting as grounds for seeking additional time to file comments. With respect to their request to place this proceeding on the Joint Board's agenda, MoPSC and ArkPSC state that Section 410(c) of the Communications Act of 1934 requires the Commission to refer any proceeding regarding the jurisdictional separations of common carrier property and expenses between interstate and intrastate operations to a Federal-State Joint Board.

4. We are not persuaded that an extension of 43 days to file comments or delaying the reply comment deadline until August 22, 1990 is warranted. We believe that the comment periods contained in the NPRM provided the parties with sufficient time to study the effects of the Commission's proposed rule change. Moreover, we believe that a motion for an extension of time is not the proper forum for deciding whether a proceeding should be presented to a Federal-State Joint Board. That issue will be decided after reviewing the comments and reply comments that are filed in this proceeding. Therefore, we are denying all aspects of the pending motions. Of course, if the NARUC adopts a joint resolution on this matter at the July meeting, we will consider a motion to accept that resolution as part of the record in this proceeding.

5. IT IS THEREFORE ORDERED, that the Motion filed by MoPSC and ArkPSC, and the requests filed by USTA and the Michigan PSC, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses, 55 Fed. Reg. 14438 (April 18, 1990).

[2] The following parties jointly filed the motion: The ALLTEL Companies, Century Telephone Enterprises System, Illinois Consolidated Telephone Company, Pacific Telesis, Southwestern Bell Telephone Company, Sugarland Telephone Company, Perco Telephone Company, Waterwood Telephone Company, Tri-County Telephone Company and the Telephone Utilities Exchange Carrier Association.

[3] Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses, DA 90-689 (released May 9, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-123

In re Applications of

FM RADIO PARTNERS LIMITED PARTNERSHIP — File No. BPH-870514MB

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BPED-870515MA

BERNALILLO COMMUNICATIONS, INC. — File No. BPH-870515MY

ALBU-Q BROADCASTING, LTD. — File No. BPH-870515NT

BRADLEY BROADCASTING, LTD. — File No. BPH-870515NW

For Construction Permit for
New FM Station, Channel 267A,
Albuquerque, New Mexico

ORDER

Adopted: May 16, 1990; Released: May 25, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On March 19, 1990, Bernalillo Communications, Inc., Albu-Q Broadcasting, Ltd., and Bradley Broadcasting, Ltd., jointly filed a Notice of Appeal with the Board, pursuant to 47 C.F.R. §1.302(b).

2. Two extensions of time were routinely granted for the filing of the Appeal. Now, however, the joint parties have filed (on May 14, 1990) a "Motion to Dismiss Appeal."

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss Appeal filed by Bernalillo Communications, Inc.; Albu-Q Broadcasting, Ltd., and Bradley Broadcasting, Ltd., on May 14, 1990, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX BROADCASTING COMPANY — MMB File 900130A

Request for Temporary Waiver
of Certain Provisions of
47 C.F.R. § 73.658

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1990; **Released: May 8, 1990**

By the Commission:

INTRODUCTION

1. On January 30, 1990, Fox Broadcasting Company (FBC) petitioned for (1) resumption of Rule Making in BC Docket No. 82-345, the then pending docket reexamining the Commission's financial interest and syndication rules, and (2) a limited waiver of the rule defining "network" that governs the applicability of those rules and the prime time access rule (PTAR).[1] We solicited public comment on FBC's petition, terminated the pending Rule Making proceeding as "stale,"[2] and launched a new Rule Making to obtain current information with which to evaluate the financial interest and syndication rules and the network definition for these rules. [3] In addition, the Commission established a three-month comment period to afford an opportunity to the private parties to forge a compromise on the rules at issue before we would accept further comments.

2. Remaining before us is FBC's request for waiver of Section 73.658(j)(4) which, for purposes of applying the financial interest, syndication, and PTAR rules, defines network to be any entity that provides 15 hours of television programming per week on an interconnected basis to 25 or more affiliates in 10 or more states. Although FBC has been providing programming on an interconnected basis to more than 25 affiliates in more than 10 states, it has not yet met the threshold for weekly hours of programming to qualify as a network under this definition. FBC now provides nine hours of interconnected programming to its affiliates, but expects to reach 18 1/2 hours by the Fall 1990 season. FBC requests that the waiver be effective until the Commission completes its review of the underlying rules, and proposes the following conditions if the waiver is granted: (1) FBC would not supply more than 30 hours of weekly programming to its affiliates, of which no more than 17 hours would be presented during prime time; (2) neither FBC nor any associated company would acquire any form of financial interest or syndication rights in programs it licenses from third parties for network exhibition;[4] and (3) FBC would not supply any network programming to its affiliates during the "7-8 p.m. 'access period'"[5] Monday through Saturday. Moreover, to the extent that FBC supplies programming during the access period on Sundays, its broadcasts would comply with the provisions of the PTAR rule.[6]

3. For the reasons explained below, we are granting FBC a limited, temporary and conditional waiver of Section 73.658(j)(4). The waiver will permit it to provide an additional 3 1/2 hours of weekly programming on an interconnected basis beyond the network threshold of 15 hours. This waiver will be effective upon release of this Order and will continue for one year, or until the effective date of a report and order in MM Docket No. 90-162, whichever occurs first. Thus, unless we take contrary action in a subsequent Rule Making, FBC may provide the additional programming it plans for the upcoming fall television season without being subject to the financial interest and syndication rules, so long as it abides by the conditions we have imposed on the waiver.[7]

4. This temporary and limited waiver, in the Commission's judgment, will further three significant public interest objectives. First, it will lend stability to the program plans of the 112 UHF outlets that are affiliated with FBC during the pendency of MM Docket No. 90-162, thereby advancing our longstanding public interest goal of fostering a competitive UHF service.[8] Second, we find that this action will advance the Commission's oft-stated public interest objective of encouraging new national networks.[9] Third, we note that this waiver will promote the Commission's longstanding interest in more, and more diverse, children's programming.[10] In this regard, FBC states that such children's programming will constitute 5 1/2 hours of its 18 1/2 hour schedule. We also conclude that grant of a limited and temporary waiver is particularly appropriate in view of the Commission's decision to conduct an overall Rule Making on the financial interest and syndication rules and network definition. We expect to complete MM Docket No. 90-162 before the one-year waiver period expires, thereby ending any uncertainty over the future of these rules and their application. We wish to make it expressly clear, however, that our action on this petition in no way presages or foreshadows the outcome of MM Docket No. 90-162. It also is in no way intended as a signal to the private negotiating parties as to how they should or should not proceed.[11]

BACKGROUND

5. In an earlier petition filed in June, 1988, FBC requested that the Commission apply the definition of network in a way that would exclude FBC.[12] Later, in an August 1988 filing, FBC proposed that the definition cover only ABC, CBS, NBC, and any "equivalent national network" but indicated that it would put its network definition proposal on hold to await the outcome of industry negotiations concerning changes to the financial interest and syndication rules themselves.[13] Since that time industry negotiations have not produced agreement; meanwhile, the FBC network has grown to include 129 affiliates reaching 90.3 percent of the nation's television households. FBC filed its current petition in order to proceed with its plan to offer 18 1/2 hours of programming for the Fall 1990 season, including 5 1/2 hours of children's programming, without triggering the financial interest, syndication, and PTAR rules.

6. The Commission previously has granted two waivers to networks supplying 15 or more hours of programming. In 1981 the Christian Broadcasting Network (CBN) was

granted a waiver of the network definition contained in Section 73.658(j)(4), permitting it to provide up to 30 hours of interconnected programming without being subject to the financial interest, syndication, and PTAR rules.[14] In granting CBN the waiver, the Commission contrasted the 15-hour limit of the network definition to the 86 to 96 hours of weekly programming provided by each of the three major networks, and concluded that the 15-hour figure was, in CBN's case, overly restrictive. The Commission ultimately permitted CBN to broadcast 30 hours of weekly programming without qualifying as a network under these rules, noting that 30 hours represented one-third the average amount supplied by each of the three major networks.[15]

7. In 1989 the Home Shopping Network (HSN) was granted a permanent waiver of the dual network[16] and PTAR rules.[17] HSN operated two different networks, one during the day and one during only the late night/early morning hours. Only when both networks were considered together was the definition of network met. The Commission reasoned that the PTAR and dual network rules were not intended to apply to entities like HSN, because HSN did not present the types of problems addressed by the rules. Specifically, it did not depend on national advertisers for revenue, was not involved in producing or acquiring traditional entertainment programming, and did not seriously compete with other network or non-network program suppliers. The Commission also noted that the waiver would encourage the growth of a program service alternative to the traditional networks, and would foster the creation of new UHF stations, and would thereby assist in accomplishing the major goals in pursuit of which the rules were established.

DISCUSSION

8. In response to FBC's request for resumption of the Rule Making in BC Docket No. 82-345, the Commission recently launched a reexamination of the financial interest and syndication rules by commencing a new proceeding, MM Docket No. 90-162. FBC seeks temporary relief pending the completion of that proceeding.

9. As previously noted, although FBC currently provides its affiliates with 9 hours of programming per week, FBC intends to provide 18 1/2 hours, including 5 1/2 hours of children's programming, by September.[18] This Commission has long stressed the importance of programming for children and of strengthening competition among stations; we intend that our actions should foster these goals. Granting this waiver furthers the Commission's longstanding goals of strengthening competition among stations, increasing programming diversity, and serving the needs of children. In addition, many of the commenters have noted that FBC programs have increased the viability of FBC outlets, including many UHF outlets, permitting them to better serve the public interest.

10. Generally, FBC, FBC Affiliates, and a contractor engaged by FBC support the FBC request for waiver[19], while the major networks and a number of studios oppose the request.[20] The commenters have raised four basic issues: (1) whether FBC is similarly situated and competitive with the three major networks; (2) whether any limited waiver should include the PTAR within its coverage; (3) whether the waiver would facilitate or impede the negotiations encouraged by the Commission among the major industry participants; and (4) whether FBC could accomplish its goal by putting its syndication interests in trust until final Commission resolution of the pending Rule Making.

FBC's Competitive Position

11. FBC argues that, measured by any relevant standard, it does not currently exercise the economic power of the three major broadcast networks, and is in most respects not competitive with them. Grant of a limited waiver, FBC argues, will not significantly change that situation.[21] The networks do not dispute the facts set forth by FBC, but do dispute their significance. They argue that the differences between themselves and FBC do not justify the requested waiver.[22] The networks and Chris-Craft *et al.* also argue that FBC is part of a large and successful media conglomerate and fits the paradigm of "major national television network" to which the Commission intended to apply the aforementioned rules. They note that FBC, with a nationwide affiliate base and control over programming available to most households nationwide, possesses the abilities and incentives that led to the adoption of the rules: bargaining leverage with producers, and conflicts of interest in syndicating and selecting programs for network exhibition.[23]

12. We find that due to the special circumstances presented in the FBC petition, as well as the pendency of the new Rule Making, the public interest warrants a conditional waiver for a relatively short period.[24] First, although FBC is indeed part of an integrated media enterprise, FBC itself, as a developing television network, is relatively small and new compared to its established industry competitors. Especially in light of our ongoing Rule Making proceeding and the uncertainty about the proper scope of these rules, rigid application of the rules to an emerging competitor at this time would disserve the public interest.[25] Second, for the next year FBC proposes to supply only 3 1/2 hours of programming above the 15 hours that trigger the definition of a network.[26] Because much of FBC's proposed new programming is intended to be for children, and because its programming service in general has enhanced the viability of its UHF affiliates, short-term relief will promote the public interest in UHF station competitiveness and increased programming for children. Third, the waiver we grant is of strictly limited duration. We believe that this unique combination of benefits to UHF stations, children's programming, and the continued growth of a potential fourth network competitor, coupled with the limited and temporary nature of the waiver, outweighs the risks cited by opponents of the waiver.

13. We condition the waiver to permit FBC to supply no more than 18 1/2 hours of programming per week, and further limit the waiver to one year or until the pending Rule Making is completed, whichever occurs first.[27] Although FBC requested a waiver for 30 hours of programming to take it through the 1992 season, such relief is unnecessary given this Commission's commitment to reach a final conclusion on the underlying rules well before then.[28] Given the limited duration and scope of this waiver, we also find it unnecessary to engage in protracted analysis of the various economic factors by which FBC could be compared to CBS, NBC, and ABC.[29] Even if our analysis were to focus on potential harm to these networks rather than the overall effect of the waiver on the marketplace, the impact of this temporary and

limited waiver upon those networks would not be substantial.[30] For example, the increase in program hours beyond those that would otherwise be permitted is marginal, and FBC proposes to broadcast fewer than 15 hours during prime time.

14. Furthermore, in order to ensure that our waiver is no broader than necessary, we are incorporating additional limitations suggested by FBC. While the waiver remains in effect, neither FBC nor any related company[31] may acquire any financial interest or syndication rights in any new programs it licenses from third parties for exhibition on FBC. FBC has requested one exception to this limitation concerning Fox Television's owned-and-operated stations' share in the profits and licensing revenues from children's programming aired by the Fox Children's Network under agreements similar in scope and nature to those with non-owned-and-operated FBC affiliates. We are unwilling to allow Fox's owned-and-operated stations to have such a financial interest. FBC's request would permit Fox's owned-and-operated stations to enter into joint ventures with non-related producers and yet distribute their product on FBC. Such an exception is too broad. We see no reason why the Fox Children's Network programs cannot go forward, however, if Fox's owned-and-operated stations were to forgo a financial interest.

15. Our action today also is in no way intended to deter, or forestall FBC's publicly announced plans to air, live, news events of national importance.[32] As Fox evolves from a group of independent television stations to a genuine source of nationwide programming and ultimately to a full-fledged network, our rules should not prevent it from covering major events of national significance such as Presidential State of the Union addresses and the Congressional response, major news conferences, or major national events such as the return of hostages -- the type of programming that established national broadcast networks carry, and which adds significantly to the quality of our national life. For the duration of this waiver, therefore, the live coverage of bone fide news events of national importance will not count against the 18 1/2 hour programming limit adopted today.

PTAR

16. FBC requests that we waive the PTAR rule to permit its affiliates to use their inventory of off-network programming which had been purchased because of the uncertain outcome of this waiver request and the related Rule Making proceeding. The FBC Affiliates agree not to use FBC network programming for this time period, but wish to use their inventory of off-network syndicated programming. Together they argue that it would be harmful financially to these stations, some of which are financially marginal, if they could exhibit this costly programming only in non-prime time periods, because they could not recover its cost during any other part of the day.[33] CBS, ABC and NBC vigorously oppose this request. CBS notes that even without a waiver, the affiliates would have prime time available until at least the fall of 1991, and also could use the heavily-viewed hour before prime time begins for this purpose. ABC and NBC argue that any station that actually licensed excess programming should be required to demonstrate its individual need for a waiver.[34]

17. As a consequence of the temporary and conditional waiver of the network definition that we grant today, FBC affiliates will not be subject to the PTAR rule during the pendency of this waiver. We note that stations affiliated with FBC have contributed to the public interest benefits flowing from FBC's emergence as a competitor to the established networks. We do not believe that the public interest would be served by imposing the PTAR rule on these stations at this time. In this regard, the comments indicate that many affiliates have purchased off-network programming for the early evening "access period," and would be required to make an additional significant investment to fill the time if they cannot use programming already purchased. The short duration of this waiver, and the relatively short time until the Commission intends to complete its evaluation of the network definition, do not warrant our imposing such cost in the light of the important public interest benefits to be promoted by the waiver. *See* paragraph 12, *supra*. Furthermore, market-by-market analyses of all FBC affiliates similarly is not necessary because of the waiver's limited duration and the public interest benefits involved. In addition, in light of the short duration of the waiver, the administrative burden to the Commission of reviewing market-by-market applications and determinations would be unwarranted.[35] Finally, as an additional safeguard, the scope of the waiver will be limited: FBC, pursuant to the terms of its waiver, may not supply any FBC network programming to its affiliates during the access period Monday through Saturday, and must limit its provision of programming on Sunday to that which is exempt from PTAR.[36]

The Waiver's Effect Upon Negotiations

18. CBS and ABC argue that granting the FBC request for a waiver would remove any incentive that Fox might have to participate actively in industry negotiations to reach a compromise on the underlying financial interest and syndication rules,[37] an objective the Commission endorsed when we announced our new Rule Making to reconsider the rules themselves.[38] FBC has not been a direct party to the negotiations,[39] although in 1988, in response to comment on its first request that the definition of network be amended, FBC agreed to await resolution of the industry negotiations "to the extent [they] proceed quickly and diligently."[40] We believe that FBC, as an entity potentially affected by these rules, has an incentive to participate in reaching a consensus recommendation on the underlying rules before we accept comments in our Rule Making docket, and we urge that FBC work toward that end.[41] In any event, we reach our decision based on our analysis of public interest considerations. We emphasize again: our action on this petition in no way presages or foreshadows the outcome of MM Docket No. 90-162. Nor is it in any way intended to send a signal to private parties negotiating as to how they should or should not proceed.

Trust

19. As a final issue, ABC and CBS propose that a solution to Fox's dilemma of being both a program syndicator and a network would be to place its syndication interests in a temporary trust until the Commission completes its review of the underlying rules. The two networks cite the trust concept approved for tender offers and proxy contests.[42] FBC responds that creation of a trust would unnecessarily disrupt its business and cause the same dislocations and inconveniences that would be imposed by a forced divestiture. FBC also argues that in previous cases, trusts have been used to allow a result

otherwise prohibited by the Communications Act itself. In this case, however, such a statutory underpinning does not exist, since the result would be prohibited by the Commission's own rules rather than the Act.[43] Finally, the Media Access Project and Office of Communication of the United Church of Christ state that the trust proposal is "self-contradictory" because Fox would be both the grantor and the primary beneficiary, and thus the trustees would have conflicting duties.[44]

20. We reject any suggestion that we require FBC to place its program syndication business in a trust. The time remaining before we will complete the Rule Making on the financial interest and syndication rules is short. Given this fact, and the minimal amount of programming to be supplied in excess of that permitted without waiver, we find the costs of establishing such a trust, even if practical, far outweigh any public interest benefits.[45] Moreover, on a number of occasions we have granted temporary waivers until Rule Makings were completed to prevent unnecessary hardship should the rules be amended, without prejudice to the Rule Makings themselves.[46]

21. Accordingly, IT IS ORDERED that FBC's petition for waiver of Section 73.658(j)(4), 47 C.F.R. § 73.658(j)(4), IS GRANTED IN PART AND IS DENIED IN PART, as specified in this Memorandum Opinion and Order.

22. In addition, IT IS ORDERED that the supplemental or late-filed comments submitted by Capital Cities/ABC, CBS, Sinclair Broadcasting Group, and Walt Disney ARE ACCEPTED; that the oppositions to supplemental comments submitted by FBC and FBC Affiliates ARE ACCEPTED; and that the further supplemental comments submitted by CBS and further response by FBC ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS

1. THE ABC TELEVISION AFFILIATES ASSOCIATION
2. ACTION FOR CHILDREN'S TELEVISION
3. THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.
4. THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.
5. AUSTIN TELEVISION (KBVO-TV)
6. BONNEVILLE INTERNATIONAL CORPORATION
7. CAPITAL CITIES/ABC, INC.
8. CBN CONTINENTAL BROADCASTING NETWORK, INC.
9. CBS INC.
10. CBS TELEVISION NETWORK AFFILIATES ASSOCIATION
11. CHANNEL 17 ASSOCIATES, LTD.
12. CHRIS-CRAFT/UNITED TELEVISION STATION GROUP, TRIBUNE BROADCASTING COMPANY, GAYLORD BROADCASTING COMPANY, CHANNEL 50 TV CORP. and MCA BROADCASTING INC.
13. THE COALITION TO PRESERVE THE FINANCIAL INTEREST AND SYNDICATION RULE
14. D&K BROADCASTING
15. DUCHOSSOIS COMMUNICATIONS COMPANY OF IOWA, INC. d/b/a KDSM-TV
16. FBC TELEVISION AFFILIATES ASSOCIATION
17. FISHER BROADCASTING, INC.
18. KING WORLD PRODUCTIONS, INC.
19. MALRITE COMMUNICATIONS GROUP, INC.
20. MEDIA ACCESS PROJECT AND OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST
21. MMC TELEVISION CORP.
22. NATPE INTERNATIONAL
23. NATIONAL BROADCASTING COMPANY, INC.
24. NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
25. ORBIS COMMUNICATIONS, INC.
26. PAPPAS TELECASTING COMPANIES
27. PORTLAND BROADCASTING, INC. (WPXT-TV)
28. THE PROGRAM PRODUCERS AND DISTRIBUTORS COMMITTEE
29. PROVIDENCE JOURNAL COMPANY
30. RAINBOW BROADCASTING, INC.
31. RENAISSANCE COMMUNICATIONS CORP. d/b/a KTXL-TV
32. WALT DISNEY COMPANY
33. WCGV-TV
34. WESTINGHOUSE BROADCASTING COMPANY, INC. ("GROUP W")
35. WMSN-TV

REPLY COMMENTS

1. ABC AFFILIATES ASSOCIATION
2. CAPITAL CITIES/ABC, INC.
3. CBS AFFILIATES
4. CBS INC.
5. CHESAPEAKE TELEVISION, INC.
6. FBC TELEVISION AFFILIATES ASSOCIATION
7. FOX BROADCASTING COMPANY

8. FOX BROADCASTING COMPANY (ANCILLARY REPLY)

9. INDEPENDENT STATIONS

10. KCAL-TV

11. KING WORLD PRODUCTIONS, INC.

12. MEDIA ACCESS PROJECT AND OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST

13. NATIONAL BROADCASTING COMPANY, INC.

14. PAPPAS TELECASTING COMPANIES

15. THE PROGRAM PRODUCERS AND DISTRIBUTORS COMMITTEE

16. THE TELEVISION OPERATORS CAUCUS BOARD OF DIRECTORS

17. WTTE CHANNEL 28, INC.

SUPPLEMENTAL OR LATE - FILED COMMENTS

1. CAPITAL CITIES/ABC, INC.

2. CBS INC.

3. SINCLAIR BROADCASTING GROUP, INC.

4. WALT DISNEY COMPANY

OPPOSITION TO SUPPLEMENTAL COMMENTS

1. FBC TELEVISION AFFILIATES ASSOCIATION

2. FOX BROADCASTING COMPANY

FURTHER SUPPLEMENTAL COMMENTS

1. CBS INC.

FURTHER RESPONSE

1. FOX BROADCASTING COMPANY

FOOTNOTES

[1] 47 C.F.R. § 73.658(j)(1)(i) and (ii), (j)(4), and (k) (1989). The PTAR rule was not under consideration in this Rule Making, nor is it now under consideration in MM Docket No. 90-162, other than as part of the network definition issue.

[2] Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules, *Order*, 5 FCC Rcd 1814 (1990).

[3] Evaluation of the Syndication and Financial Interest Rules, *Notice of Proposed Rule Making*, 5 FCC Rcd 1815 (1990).

[4] FBC proposes an exception to this condition to allow its owned-and-operated stations to share in the profits and residual licensing for the programs to be aired by the Fox Children's Network on a basis equivalent with its other affiliates. FBC pledges not to make similar arrangements as to its other (non-children's) programs. FBC Opposition at 2-3, n. 4.

[5] *See* FBC Reply Comments at ii, 7.

[6] In supplemental reply comments submitted after the reply deadline expired, CBS and ABC question whether FBC included its associated corporate companies within the ambit of conditions it agreed would be part of the waiver. FBC and FBC Affiliates oppose acceptance of the untimely filed comments. CBS submitted further supplemental comments, and FBC filed a response. In order to have a full and complete record, we will accept the late-filed comments of CBS and ABC, the oppositions of FBC and FBC Affiliates, CBS' further supplemental comments, and FBC's response. In responding to the arguments of CBS and ABC that FBC might be using imprecise language about its corporate structure to circumscribe the reach of its proposed waiver conditions, FBC has indicated that except for its planned children's programs, *supra* note 4, it intends to apply the restriction on obtaining syndication rights and/or financial interests in programs licensed from third parties for FBC exhibition on an interconnected basis both to itself and to its associated companies. In any event, the terms and application of the waiver conditions have been determined by the Commission, not FBC. The Commission has decided to apply certain conditions similar to those proposed by FBC to both FBC and to any person, entity or corporation controlling, controlled by, or under common control with FBC. *See infra* at ¶ 14.

[7] In addition to these limits, neither FBC nor any related company may acquire any financial interest or syndication rights in programs it licenses from third parties for network exhibition, *see* ¶ 14, *infra*. FBC also is prohibited from supplying any network programming during the "access period" Monday through Saturday, and is required to limit its provision of programming on Sunday to that which qualifies for an exemption to PTAR.

[8] For example, in the national ownership rules, the Commission took into account the limitations of UHF stations, treating them differently for the purpose of calculating audience reach. Amendment of Section 73.3555, *Memorandum Opinion and Order*, 100 F.C.C. 2d 74 at 92-94 (1985). More recently, the Commission noted that a waiver of the one-to-a-market rule for a combination involving a UHF-TV station "may provide relatively greater public interest benefits and impose relatively fewer public interest costs." Amendment of Section 73.3555, *Second Report and Order*, 4 FCC Rcd 1741, 1753 (1989), *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989). While the Commission has not found it necessary to retain every policy it has had to assist the development of UHF stations, *see* Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, *Report and Order*, 3 FCC Rcd 638 (1988), nevertheless, these decisions are examples of the Commission's longstanding concern about the continued and overall health of the UHF service.

[9] *See, e.g.*, Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. I, Oct. 1980); Competition and Responsibility in Network Television Broadcasting, 25 FCC 2d 318, 333 (1970).

[10] *See, e.g.*, Children's Television Report and Policy Statement, 50 FCC 2d 1 (1974), *aff'd sub nom. ACT v. F.C.C.*., 564 F.2d 458 (D.C. Cir. 1977); Television Programming for Children: A Report of the Children's Television Task Force (1979); Children's Television Programming and Advertising Practices, *Report and Order*, 96 FCC 2d 634 (1984), *aff'd sub nom. ACT v. F. C. C.*, 756 F.2d 899 (D.C. Cir. 1985).

[11] Our action today should not be seen as a determination that the definition of a network should or necessarily will be changed as a result of MM Docket No. 90-162. Indeed, if at the end of our Rule Making we have determined that no change in the definition is warranted, or if the one-year waiver term expires before then, FBC will be required to conform to the current network definition.

[12] *See* Letter from Fox Television Stations Inc. to the Chief of the FCC Mass Media Bureau dated June 7, 1988. This letter was put on public notice and a comment filing period established on June 22, 1988, Public Notice No. 3474. *See also* FBC Petition for Waiver at 7, n.4.

[13] *See* Reply Comments of Fox Broadcasting Co. dated August 5, 1988, at 3, n.3, in the 1988 proceeding, *supra* note 12.

[14] Christian Broadcasting Network, Inc., 87 F.C.C. 2d 1076 (1981). The Commission does not believe that the CBN waiver establishes precedent for granting FBC a 30-hour waiver. In this regard, we note that at the time of the waiver, CBN served fewer affiliates than FBC serves today, and unlike FBC, it was not significantly involved in producing, acquiring, or distributing programs to commercial stations for airing during prime time; nor was CBN significantly involved in the sale of national advertising. Indeed, CBN paid broadcasting stations to carry its programming with the understanding that no commercial interruptions would be allowed. *See* ABC Comments at 18-19, citing *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295 at 1308, 1312 (D.C. Cir. 1983).

[15] CBN, *supra* n.14 at 1078-79. The Commission also expressed concern therein that the network definition might be overly restrictive in light of new and emerging means of program distribution. *Id.* at 1078. We defer any consideration of the appropriateness of the definition itself to our reexamination of the financial interest and syndication rules in MM Docket No. 90-162.

[16] 47 C.F.R. § 73.658(g), (k) (1989).

[17] Home Shopping Inc., 4 FCC Rcd 2422 (1989); *see also* Univision, Inc., 4 FCC Rcd 2417 (1989).

[18] *See* FBC Reply Comments at 8. We note that FBC could add all of its proposed prime time programming, but not its proposed children's programming, and still not exceed the 15-hour limit.

[19] CBN Continental Broadcasting Network; ACT, Henry Geller and Donna Lampert; and Media Access Project and Office of Communication of the United Church of Christ support or "do not oppose" FBC's request for waiver in comments principally directed to the subject rules themselves rather than to the request for waiver.

[20] The Association of National Advertisers also opposes the waiver.

[21] In support of its assertions, FBC notes the superior range and signal of VHF stations compared to UHF stations with equivalent facilities, and states that it has only 17 VHF affiliates serving 24.1 percent of U.S. households, compared with 128 serving 83.9 percent for ABC, 155 serving 91 percent for CBS, and 140 serving 86 percent for NBC. Conversely, 66.2 percent of its coverage is with UHF stations (112), compared with 14.3 percent for ABC (56), 7.2 percent for CBS (29), and 12.4 percent for NBC (47). FBC Petition at 32-40. In addition, FBC notes that it has been on the air for only 3 years, compared with 42 years for ABC and CBS, and 44 years for NBC. Although it has been argued that cable has eliminated UHF stations' disadvantage, we do not find that argument persuasive. For example, 42 percent of all homes do not subscribe to cable. *Broadcasting*, April 30, 1990 at 18. In addition, because UHF signals generally do not have coverage as broad as VHF stations, UHF stations generally are carried on fewer cable systems.

[22] *See, e.g.*, NBC Comments at 53-57; CBS Comments at 16-27.

[23] Chris-Craft *et al.* Comments at ii.

[24] For the reasons cited above, *supra* ¶ 9, despite the differences between FBC and CBN, *supra* n.14, limited relief in this case is in the public interest.

[25] Some opponents of FBC's waiver request argue that FBC has not proven in any statistical manner that a waiver is essential for its development as a fully competitive network. A statistical analysis is not, however, necessary for us to make a determination in this case. Based on our experience and our analysis of all of the factors in this proceeding, we can reasonably conclude that a waiver will assist FBC in its development effort and that the public interest thereby will be served. *See F.C.C. v. WNCN Listeners' Guild*, 450 U.S. 582 (1981).

[26] In this regard we note that FBC states that as of November, 1989, ABC provided 83 hours of network programming, CBS 115.5, and NBC 100. FBC Petition at App. E.

[27] Additionally, notwithstanding today's action by the Commission, FBC and its affiliates continue to be subject to all applicable network rules not specifically waived by this Order.

[28] The FBC Affiliates also argue that application to them of the financial interest, syndication, and PTAR rules constitutes an infringement of speech which violates the First Amendment. *See* FBC Affiliates Comments at 32-49 and Reply Comments at 21-23. However, these regulations have been found not to violate the First Amendment by the Court of Appeals in *Mt. Mansfield v. F. C. C.*, 442 F.2d 470 (2d Cir. 1971). In light of the action we are taking, we do not find it necessary to consider these arguments further.

[29] We find that these factors constitute the special circumstances required to justify exempting FBC from the network definition of Section 73.658(j)(4). We also find that it is in the public interest to grant such a limited, conditional waiver to an emerging network when it provides the benefits to UHF stations and children's programming discussed above. *See Northeast Cellular Telephone Co. v. F. C. C.*, Docket Nos. 89-1206 and 89-1214 (D.C. Cir. March 9, 1990); *WAIT Radio v. F. C. C.*, 418 F.2d 1153 (D.C. Cir. 1969). Additionally, we need not address the argument of NBC and CBS regarding the alleged violations of the Equal Protection Clause as neither they nor anyone else other than FBC has requested a waiver in this case. Accordingly, that question is not ripe for decision at this time.

[30] The Walt Disney Company alleges misconduct by FBC in the marketing of its children's programs, and has initiated a civil suit before a U.S. District Court in California. FBC filed detailed ancillary reply comments to Disney's allegations disputing Disney's contentions and arguing that Disney is attempting to use its dominant power in children's television to lock-up afternoon children's programming hours and to intimidate FBC from competing with its own children's programming. Notwithstanding the merits of either party's charges, our grant of a temporary and limited waiver permitting FBC to provide only 3 1/2 hours of programming in addition to that already allowed will not substantially affect the relative positions of these parties. Further, the public interest benefits (discussed *supra* at paragraph 12) more than outweigh any short-term impact the waiver may have on the ability of Disney and others to compete in the programming market, an impact that appears minimal at most. While not prejudging the issues involved in the district court suit, given FBC's detailed response as well as the unique public interest benefits of the short-term and limited waiver being granted, we do not believe that the allegations made by Disney provide any reason to delay this action. Upon final adjudication by the court, parties are free to bring the court's opinion to our attention insofar as it may be pertinent to either the waiver or to Fox as a licensee. In addition, Chris-Craft *et al.*, independents that collectively own and operate or control 18 stations unaffiliated with any network, allege that FBC already has shown a propensity to engage in anticompetitive behavior based on a trade press account of the Disney case and another concerning FBC's reaction to consideration by one of its affiliates of running a new program service on two nights. Chris-Craft *et al.* Comments at 22-24. Rainbow Broadcasting, which currently is competing with Fox for the Los Angeles channel 11 license, similarly alleges that Fox has engaged in anticompetitive and deceptive behavior and that

presentation of some of its allegations has been stymied by Fox's abusive delay of the designation of a hearing in that comparative licensing case. Rainbow requests the Commission to conduct a hearing on these anticompetitive allegations before deciding whether to grant the waiver requested in this proceeding. Rainbow Comments at 1-3. With respect to these additional allegations, we find that the public interest benefits discussed above more than outweigh any short-term impact that this very limited waiver could have on competition in the programming market.

[31] For purposes of this proceeding, the terms "related company" or "associated corporation" mean "any person, entity, or corporation controlling, controlled by or under common control with FBC."

[32] *See, e.g., Broadcasting,* April 16, 1990 at 41.

[33] FBC Affiliates Comments at v.

[34] CBS Reply Comments at 7; ABC Reply Comments at 10-13; NBC Comments at 58, n.20; NBC Reply Comments at 6, n.*.

[35] For the same reasons, separate analyses of the positions of FBC's VHF and UHF affiliate stations are unwarranted. *See* NBC Comments at 58, n.20.

[36] *See* FBC Reply Comments at ii-iii.

[37] *See, e.g.,* CBS Reply Comments at 3-4; ABC Reply Comments at 4-5.

[38] *Supra* note 3.

[39] FBC Petition at 11; ABC Comments at 6.

[40] *See* FBC Petition at 7-13; ABC Comments at 6.

[41] *See* FBC Affiliates Reply Comments at 5-8. We observe, incidentally, that FBC has agreed to participate in the negotiating sessions being held later this month in Los Angeles. *See, e.g., Broadcasting,* April 30, 1990 at 37.

[42] ABC Comments at 35-37; CBS Comments at 11 n.37.

[43] FBC Reply Comments at 49-50.

[44] Media Access Project and the Office of Communication of the United Church of Christ Reply Comments at 6.

[45] Examples of costs associated with creating a trust in this instance -- even if only a temporary trust -- could include: corporate restructuring; putting the restructuring to shareholder or director approval; complying with applicable securities rules and regulations; accounting audits; tax consequences; renegotiation of contracts; financing the trust; and significant legal fees associated with all of the above.

[46] *See, e.g.,* Capital Cities/ABC, Inc., 2 FCC Rcd 2539 (1987); *Taft Broadcasting Co.,* 2 FCC Rcd 6622 (1987); and *Spanish International Network,* 3 FCC Rcd 2746, 2752 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-112

In re Applications of

JOE L. ALDRIDGE File No. BPH-871201MA

TOWER COMMUNICATIONS, INC. File No. BPH-871203MM

For Construction Permit for a New FM Station on Channel 289A in Hawesville, Kentucky

Appearances

Timothy K. Brady, on behalf of Joe L. Aldridge; *Howard M. Weiss*, on behalf of Tower Communications, Inc.; and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: May 16, 1990; Released: May 24, 1990

I. PRELIMINARY STATEMENT

1. Two applicants remain in this FM radio proceeding. Joe L. Aldridge ("Aldridge") and Tower Communications, Inc. ("Tower") each seek authority to construct and operate a new commercial FM radio station on Channel 289A in Hawesville, Kentucky.

2. The case was designated for hearing on standard comparative and coverage issues[1] on May 23, 1989. *Hearing Designation Order*, 4 FCC Rcd 4480 (MMD 1989).

3. The prehearing conference was held on July 24, 1989. The hearing was held on November 1, 1989. The record was closed at the conclusion of that session. (Tr. 175). Proposed findings of fact and conclusions of law were filed on December 15, 1989, and replies on January 8, 1990. (Tr. 176).

II. FINDINGS OF FACT

Joe L. Aldridge

4. Joe L. Aldridge is an individual applicant who will be integrated into the management and operation of the proposed station on a full-time (minimum of 40 hours per week) basis as the General Manager. In this role, Mr. Aldridge will assume responsibility for supervision of all phases of station operation, including overall supervision of the performance of all station employees in their assigned duties. All management level employees will report directly to him. His duties will also include overseeing the continuing ascertainment of community needs and interests and formulating responsive programming to meet those needs and interests; formulating station policy; assuring station compliance with the Commission's Rules and Regulations; and effectuating the station's EEO program. (Aldridge Ex. 1).

5. Mr. Aldridge is currently employed by an accounting firm which he owns. He will terminate his employment with this firm in the event his application is granted in order to allow him to fulfill his integration proposal. His wife, who is currently engaged full-time in the accounting practice with him, will take over his current duties at the accounting firm. (Tr. 18, 21, 27). He has also discussed with his wife the possibility of hiring someone to replace him. (Tr. 23-24, 65-66). If he obtains the construction permit, he will not devote any time to the accounting business. (Tr. 26-27). Mr. Aldridge also has a dealership for the purpose of selling horse and stock trailers. He will devote no more than two hours per week to this activity. (Aldridge Ex. 1).

6. Mr. Aldridge was born and raised in Hawesville, Kentucky, and graduated from Hancock County High School in 1966. He subsequently attended Owensboro Business College, graduating in 1968, and Brescia College, Owensboro, Kentucky, receiving his degree in 1973. During the time he attended Owensboro Business College and Brescia College, he commuted, continuing to reside full time in Hawesville. (Aldridge Ex. 1).

7. Mr. Aldridge currently resides at Route 2, Box 1363, Hawesville, Kentucky, which is within the city boundaries of Hawesville. He has resided at this address since 1974. From 1948 to 1974, Mr. Aldridge resided at Route 2, Box 1410, Hawesville, Kentucky, which is also within the city boundaries of Hawesville. He has maintained no other residences. If his application is granted, Mr. Aldridge will continue to reside at his current address, within the city boundaries of Hawesville, Kentucky, and will not maintain any other residence. (Aldridge Ex. 1).

8. Mr. Aldridge was employed by WHRS(AM), Winchester, Kentucky, from April 1986 to December 1988, as the station's accountant. In this capacity, he prepared financial statements, payroll tax returns, corporate tax returns and payroll. He worked approximately five hours per week. (Aldridge Ex. 1). Although not on payroll, Aldridge has also been employed by a number of other radio stations since 1975 and continuing to the present. These included WKCN(AM), Hawesville, Kentucky, WVEL(AM)/WGLO(FM), Matoon, Illinois, and WCTZ(AM), Clarksville, Tennessee. (Tr. 33, 71). In each instance, Mr. Aldridge has engaged in substantially the same activities as he did while on the payroll of WHRS, Winchester, Kentucky. (Tr. 72). These activities include the preparation of financial statements, payroll checks, payroll tax returns, check registers, payroll withholding tax and corporate tax returns. In addition, these activities have also included traffic and billing, preparing logs, and preparing affidavits for each of the various stations. (Tr. 69-71).

9. Mr. Aldridge has been involved in religious, civic, charitable and community activities in Hawesville and the service area of his proposed station. He has been a member of the Hawesville United Methodist Church, Hawesville, Kentucky, from 1955 to the present. He was a member of the Administrative Board of Hawesville United Methodist Church from 1974-1979. The Administrative Board oversaw the administration of all of the business

affairs of the church. Mr. Aldridge participated in the monthly meetings and other activities of the Board. (Aldridge Ex. 1)

10. Mr. Aldridge was a member of the Hawesville United Methodist Men from 1970 to 1985. Mr. Aldridge held the position of President of this organization in 1974, for a one year term. While a member, he attended regular meetings and participated in the activities of this group, including performing maintenance and repair work for the church and its members, as well as helping to collect food for the needy. (Aldridge Ex. 1).

11. Mr. Aldridge was a member of the Hawesville Volunteer Fire Department from 1974 to 1987. Among other things, this organization provided fire safety demonstrations and instruction for local schools, checked smoke detectors and for possible fire hazards in the homes of elderly citizens, undertook studies of possible fire hazards for local businesses, and made recommendations and gave advice on what to do in case of fire. Mr. Aldridge participated in bi-weekly meetings, as well as all of the foregoing activities undertaken by the Volunteer Fire Department. (Aldridge Ex. 1). Although no longer a member, Mr. Aldridge continues to participate in fund-raising activities for the fire department, donating his time to assist with chicken fries, car washes, and other fund-raising activities.

12. Mr. Aldridge has been a member of the Hancock County Chamber of Commerce, Hawesville, Kentucky, from 1977 to the present. The Chamber meets in both Hawesville and in Lewisport, Kentucky. Mr. Aldridge held the position of Treasurer in 1979, Secretary in 1980 and President in 1981. (Aldridge Ex. 1). An individual was only permitted to hold any one office for a single, one year term. (Tr. 80-81). He attends monthly meetings and participates in the activities of the Chamber. He was Chairman of the Chamber's annual banquet from 1979 through 1986. He also participated in and helped staff a Chamber-sponsored booth at the state fair and county fair in 1988 and 1989, which had as its goal the promotion of Hancock County. (Aldridge Ex. 1).

13. Mr. Aldridge was a member of the Marketing and Promotional Task Force of the Hawesville Improvement Committee from 1981 through 1984. This organization was organized as an arm of the City of Hawesville to develop and improve the community of Hawesville. This organization was involved in organizing and implementing various landscaping projects; sponsoring cleanup days to clean up the City of Hawesville; planning, raising money for and overseeing the creation of two mini-parks for the city; and making recommendations to the city government regarding development in the community and city planning matters. (Aldridge Ex. 1).

14. Mr. Aldridge was the Assistant Coach of a 15-member T-ball team during the summer months of 1982 through 1984. Mr. Aldridge was one of three coaches of this team. (Aldridge Ex. 1).

15. Mr. Aldridge was the Chairman of the Sorghum Open Golf Tournament from 1975 through 1987. This was a fund-raising event at the Windward Heights Country Club, which is located within the service area in Hancock County, approximately four miles from Hawesville and which serves the residents of Hawesville. (Aldridge Ex. 1).

16. Mr. Aldridge has participated in the activities of the Hancock County Saddle Club, as a member since 1983 and as its President in 1984. Among its regular activities the Saddle Club sponsors two horse shows per year in which Mr. Aldridge has been active each year since 1983. A portion of the proceeds from these two shows are used to purchase clothing for needy person in local nursing homes. (Aldridge Ex. 1).

17. Mr. Aldridge participated in the Hawesville Sesqui-Centennial Celebration in September 1986. This celebration, which was designed to promote the City of Hawesville, as well as raise funds for various community projects, included a parade, a number of food and craft booths sponsored by various civic organization, and other activities. The proceeds went to purchase computer equipment for the local schools and to the various projects of the civic organizations involved. (Aldridge Ex. 1).

18. In 1984 Mr. Aldridge received a letter of appreciation from and was commissioned an Honorary Deputy Sheriff by the Hancock County Sheriff for his support of the Sheriff's Department's drug interdiction and education program. (Aldridge Ex. 1).

19. Mr. Aldridge will install and utilize auxiliary power generating equipment at both his studio and transmitter sites for the purpose of providing continuous service to the community and service area in the event of power outage or other emergency situation requiring an auxiliary power source. (Aldridge Ex. 1).

Tower Communications, Inc.

20. Tower is an Indiana corporation organized on November 30, 1987. Tower is authorized to issue 1,000 shares of common and preferred stock. One hundred shares of common stock and 50 shares of preferred stock have been issued to Jay Roland Brewer. The balance of the shares will be designated as common or preferred if and when they are issued. Jay Roland Brewer is also the sole director and President and Secretary of Tower. There are no other officers. (Tower Ex. 1 at 1; Tr. 98-101, 120-21).

21. Tower's preferred stock is non-voting. Each outstanding common share of Tower's stock entitles its holder to one vote on each matter submitted to a vote of the shareholders.

22. When Tower filed its application on December 3, 1987, James R. Brewer, Jay Roland Brewer's father, held the 50 shares of preferred stock now held by Jay Roland Brewer. James R. Brewer died on August 12, 1988. His preferred stock passed to his estate. On October 6, 1988, Jay Roland Brewer purchased the preferred stock held by the estate. (Tower Ex. 1 at 1).

23. With the exception of Jay Roland Brewer's position as General Manager of Station WTCJ(AM), Tell City, Indiana, neither Tower nor Jay Roland Brewer has any other media interests. Should Tower be awarded the Hawesville construction permit, Brewer will terminate his employment and sever all connections with WTCJ(AM). (Tower Ex. 3 at 1).

24. Jay Roland Brewer was formerly a director of Jettcom, Inc., licensee of Station WJTT (FM), Red Bank, Tennessee. In Tower's application, he promised to divest that interest, should Tower be granted the Hawesville construction permit. Brewer did in fact resign from Jettcom's Board effective February 28, 1989. (*Id.*)

25. In its amendment as of right filed March 2, 1988, Tower stated that if it were awarded the Hawesville construction permit, its then preferred shareholder, James R. Brewer, would divest himself of his interest in and sever

all connections with WTCJ(AM). In the September 12, 1988, amendment to Tower's application reporting James R. Brewer's death, his estate reaffirmed the divestiture commitment. In the October 31, 1988 amendment reporting Jay Roland Brewer's purchase of Tower's preferred stock, Tower noted that the earlier divestiture commitment as to WTCJ remained in full force. (*Id.* at 1-2).

26. James R. Brewer owned Station WTCJ(AM) as a sole proprietorship. He held 51% of the stock and was an officer and director of Brewer Broadcasting Corporation ("BBC"), licensee of Stations WHON(AM), Centerville, Indiana, WQLK(FM), Richmond, Indiana, and WDCF(AM), Dade City, Florida. On the relevant comparative cut-off date, BBC was the corporate parent of Marianna Broadcasting Corporation ("MBC"), licensee of Stations WTOT(AM) and WJAQ(FM), Marianna, Florida. James R. Brewer was president and a director of MBC. These interests passed to James R. Brewer's estate upon his death. (Tr. 105-06, 128; Aldridge Ex. 4 at 1).

27. Maytha N. Brewer, wife of James R. Brewer and mother of Jay Roland Brewer, is Secretary/Treasurer, a director, and 24% shareholder in BBC. She is also Secretary/Treasurer and a director of MBC. (Aldridge Ex. 4 at 1-2).

28. If Tower is granted the construction permit for the Hawesville station, Jay Roland Brewer will terminate his employment with WTCJ and devote his full-time efforts to his proposed position as General Manager of the Hawesville facility. In that capacity, he will devote a minimum of 40 hours per week to establishing and implementing station policies, supervising and coordinating all department heads, financial management, and general supervision of all station operations. (Tower Ex. 2 at 6).

29. Under the terms of a Trust Agreement executed April 28, 1982, James R. Brewer as Grantor established a trust to which he conveyed certain of his assests, naming himself, Maytha N. Brewer and James L. Brewer as co-trustees. The decisions of James R. Brewer were to prevail in the event of any disagreement. Upon the death of James R. Brewer, the Trust Agreement provides at Section II.B(1) that the trust estate is to be divided into two separate trusts designated Trust # 1 and Trust # 2. Trust # 1 consists of an amount equal to one-half of the trust estate. Trust # 2 consists of the remaining one-half of the trust estate after the appropriate assets are deducted and allocated to Trust # 1. (Aldridge Ex. 6).

30. Section II.B(3) of the Agreement provides that income from Trust # 1 is to be paid to Maytha Brewer during her lifetime and that upon her death, the principal of Trust # 1 is to be distributed as directed by Maytha Brewer in her will. In the absence of a will, the principal of Trust # 1 is to be disposed of in the same manner as the principal of Trust # 2. (Aldridge Ex. 6). Section II.B(4) of the Trust Agreement provides that income from Trust # 2 is to be paid to Maytha Brewer during her lifetime and that a portion of the principal of Trust # 2 may be utilized for her benefit at the discretion of the trustees. (Aldridge Ex. 6). Upon the death of Maytha Brewer, Section II.(B)(5) of the Agreement provides that the principal of Trust # 2, as well as that of Trust # 1, should Maytha Brewer fail to direct its disposition by will, be distributed equally to the beneficiaries: James L. Brewer, Jerry K. Brewer and Jay R. Brewer. (Aldridge Ex. 6).

31. Jay Roland Brewer was born in Evansville, Indiana, on June 4, 1948. He resided in Tell City, within the 1.0 mV/m contour of Tower Communications, Inc.'s proposed station, from some time shortly after his birth continuously through 1962. From 1962 through 1970, he attended college prep and college out of town, but maintained his permanent residence in Tell City, returning there on holidays and during summers. Brewer resumed full-time residence in Tell City in 1979, where he has remained since and where he will remain if Tower obtains the construction permit. (Tower Ex. 2; Tr. 166).

32. Mr. Brewer initially testified that Tell City is located "just across the Ohio River from Hawesville." According to Mr. Brewer's estimate, the distance between the two communities is approximately 2.1 miles by automobile, a trip taking approximately five to ten minutes, depending on the need or lack of need to stop at two traffic lights between the communities' city limits. (Tower Ex. 2). However, on cross examination, Mr. Brewer acknowledged that, if he were to drive from Tell City to Hawesville, he would have to first pass through the City of Cannelton, Indiana, and that he would also have to cross the Ohio River by means of the toll bridge between Cannelton and Hawesville, unless he traveled by airplane. (Tr. 165). Referring to the map attached as Exhibit 1 to the Joint Engineering Exhibit (Joint Exhibit 1), Mr. Brewer was able to locate both Tell City and Hawesville. Mr. Brewer testified that Tower Communications, Inc.'s transmitter site, as depicted on the map, is located within the city limits of Hawesville and that its location on the map depicts the approximate location of Hawesville. (Tr. 167-68). The approximate distance between Tell City, Indiana and Hawesville, Kentucky as depicted on Exhibit 1 to the stipulated Joint Engineering Exhibit (utilizing the scale of miles reflected thereon) is approximately five miles. (Joint Ex. 1).

33. Jay R. Brewer has been Chairman of the Board of Southern Indiana Rehabilitation Services ("S.I.R.S.") from 1987 to the present and served as Vice President from 1985 to 1987. He has been a board member since 1984. S.I.R.S. is a non-profit organization serving Perry, Spencer, Warrick and Dubois Counties, Indiana. The 1 mV/m contour of Tower's proposed station encompasses most of Perry County and portions of Spencer County. S.I.R.S. was organized to test, train, and rehabilitate mentally and physically handicapped workers. As a board member, Mr. Brewer has participated in planning, budgeting and allocating financial resources, assessing needs of the community for rehabilitative services, development of policy and fund-raising. As Vice President, he supervised all committees. As Chairman of the Board, he presided over meetings, appointed committee chairs, and served as a member of all committees. (Tower Ex. 2). S.I.R.S.'s executive headquarters is in Booneville, Indiana, but it provides services in Perry County, within the 3.16 mV/m contour of Tower's proposed station.

34. Mr. Brewer was a member of the Perry County Chamber of Commerce from 1983 to 1986, and served as its Vice President from 1984 to 1985. As a member, he participated in planning efforts to promote Perry County and in decision making regarding allocation of funds. (Tower Ex. 2). Mr. Brewer acknowledged that the station at which he is employed as General Manager, WTCJ(AM), is a member of the Tell City Chamber of Commerce and that he functions on behalf of the station in his capacity as General Manager as the representative of the station to the Chamber of Commerce. (Tr. 159-60).

35. Mr. Brewer was a member of the Board of Trustees of the United Methodist Church in Tell City from 1984 to 1986. In that capacity, he helped oversee church finances and budgeting for operations and activities. These included community bazaars, chili suppers, and other functions, some of the proceeds of which go to charitable causes, such as food and clothing for the needy. (Tower Ex. 2).

36. Mr. Brewer was a member of the Junior Chamber of Commerce ("Jaycees") in Tell City from 1980 to 1984 and was Vice President from 1982 to 1983. In the latter capacity, he directed development programs for local young adults. (Tower Ex. 2).

37. Mr. Brewer was a committee member and Chairman for Public Relations for the Perry County American Heart Association Committee (South Division) from 1986 to 1987. As a committee member, he planned fund-raising events. As the Chairman for Public Relations, he helped promote the work of the Association via newspaper and radio advertising. (Tower Ex. 2). The Association meets at the Perry County Memorial Hospital in Tell City, within the 3.16 mV/m contour. (Tower Ex. 2; Tr. 169).

38. Mr. Brewer served as a board member of the Perry County Memorial Hospital Foundation from 1983 to 1988, and as its Vice President from 1986 to 1988. In these capacities, he assisted in raising funds for the hospital and in allocating those funds for hospital operations. (Tower Ex. 2).

39. Mr. Brewer has served as full-time General Manager of WTCJ(AM), Tell City, Indiana, from 1979 to the present. He supervises the entire staff and his duties include implementing station policies, hiring and firing, supervising station sales, developing budgets, and supervising all station operations. During the summers from 1963 to 1970, he worked at the station as an on-air and play-by-play announcer for sports broadcasts. He also maintained equipment, wrote copy, and serviced advertising accounts. (Tower Ex. 2). He provided engineering services to WJPS(AM), Evansville, Indiana, on a part-time basis during the 1970-71 academic school year. In that capacity he maintained equipment and was responsible for upkeep of the equipment log. (Tower Ex. 2).

40. Tower will install auxiliary generating equipment at the proposed station's transmitter and studio in order to permit operation in the event of a power outage. (Tower Ex. 4).

III. CONCLUSIONS OF LAW

41. Aldridge has no attributable media interests and, therefore, is not charged with any demerit under the diversification criterion. Tower has no media interests and Jay R. Brewer has proposed to divest his interest in and connection with WTCJ(AM). Furthermore, Jay Brewer will not be charged with any interest in the radio stations now held by his father's estate. Jay Brewer is only a contingent trustee or beneficiary of Trust # 2. Maytha Brewer, in her "sole and absolute discretion," may sell off any of the trusts' prospective assets, including the media interests, at any time. (Aldridge Ex. 6, Section IV(A)). Thus, even if they are included in Trust # 2, the media interests may subsequently be liquidated. If those assets are included in Trust # 1, Maytha Brewer will control them until her death and may then bequeath the broadcast interests to anyone. Tower will receive no diversification demerit.

42. Aldridge is entitled to 100% quantitative integration credit on the basis of Joe Aldridge's pledge to be integrated on a full-time basis into the management and operation of the proposed station as its General Manager. He intends to terminate his present employment by the accounting firm, turn its ownership and operation over to his wife and have no further involvement in its operations.

43. Tower is also entitled to 100% quantitative integration credit on the basis of Jay Brewer's pledge to be integrated on a full-time basis into the management and operation of the proposed station as its General Manager.

44. Aldridge's integration proposal is substantially enhanced by virtue of his life-long residence in the city of license, Hawesville, Kentucky. Brewer has lived for the great majority of his life in Tell City, Indiana, a city close by Hawesville (approximately 5 miles distant), and within the 3.16 mV/m contour of the proposed station. This service area residency enhances Tower's integration proposal, but to a lesser degree than Aldridge's proposal is enhanced by Aldridge's city of license residence. Aldridge receives a moderate preference over Tower by virtue of Mr. Aldridge's life-time residence in the community of license.

45. Tower's enhancement for the participation of Jay Brewer in civic activities in the service area are outweighed by Joe Aldridge's record of civic participation in the city of license. Again, Aldridge receives a moderate preference over Tower with respect to civic participation.

46. Tower's proposal is slightly enhanced by the broadcast experience of Jay Brewer; Joe Aldridge's experience, acquired in connection with his employment as an accountant at various radio stations, enhances Aldridge's proposal to only a very slight degree. Since both applicants propose auxiliary power, neither is entitled to any preference in that regard.

47. Aldridge's preferences for local residence and civic participation outweigh Tower's slight advantage for broadcast experience and make Aldridge the preferred applicant herein.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Joe L. Aldridge IS GRANTED; and the application of Tower Communications, Inc. IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] The parties later stipulated that there were no significant differences in their proposed coverage areas. (Tr. 9-10).

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KFRC) San Francisco, California	**MM DOCKET NO. 84-1098** File No. BR-43

For Renewal of License

GOLD COAST BROADCASTING, INC. San Francisco, California	**MM DOCKET NO. 84-1099** File No. BP-800930AL
PAUL J. GROWALD San Francisco, California	**MM DOCKET NO. 84-1100** File No. BP-830509AE
SOUTH JERSEY RADIO, INC. Richmond, California	**MM DOCKET NO. 84-1101** File No. BP-830511AG
GOLD MOUNTAIN BROADCASTING CO. San Francisco, California	**MM DOCKET NO. 84-1110** File No. BP-830512BX
COZZIN COMMUNICATIONS Richmond, California	**MM DOCKET NO. 84-1111** File No. BP-830512BQ

For Construction Permit for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1990; **Released: May 24, 1990**

By the Commission:

1. The Commission has before it: (1) applications for review filed July 7, 1989 by Paul J. Growald and Cozzin Communications Corporation, and August 14, 1989 by Cozzin, Gold Mountain Broadcasting Company and Gold Coast Broadcasting, Inc. (Gold Coast filed an erratum August 25); (2) oppositions filed September 11, 1989 by Growald, Gold Mountain, Gold Coast, and South Jersey Radio, Inc.; and (3) comments filed September 11, 1989 by the Mass Media Bureau. These pleadings relate to two decisions of the Review Board. *RKO General, Inc. (KFRC)*, 4 FCC Rcd 4997 (Rev. Bd. 1989); *RKO General, Inc. (WAXY - FM)*, 4 FCC Rcd 4679 (Rev. Bd. 1989).

I. BACKGROUND

2. Gold Coast Broadcasting, Inc., Paul J. Growald, South Jersey Radio, Inc., Gold Mountain Broadcasting, Inc., and Cozzin Communications Corporation filed applications for construction permits mutually exclusive with the renewal application of RKO General, Inc. for station KFRC in San Francisco, California. Gold Coast, Growald, and Gold Mountain specified San Francisco as the community of license, while South Jersey and Cozzin specified nearby Richmond, California.[1]

3. The Review Board reversed an initial decision by (then) Chief Administrative Law Judge Thomas B. Fitzpatrick selecting Growald as the preferred construction permit applicant. *RKO General, Inc. (KFRC)*, FCC 86D-49 (Aug. 8, 1986). The Board found that South Jersey is the preferred applicant. *RKO General, Inc. (KFRC)* 4 FCC Rcd 4997 (Rev. Bd. 1989). According to the Board, South Jersey and Cozzin, the applicants proposing Richmond (which has no existing broadcast outlet) as their community of license, are entitled to preferences over the San Francisco applicants under § 307(b). The Board held that the policy enunciated in *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), did not require that Richmond be treated as integrally related to the San Francisco-Oakland metropolitan area, and thus as indistinguishable from San Francisco for purposes of § 307(b).

4. The Board also concluded that Cozzin's principal Joseph T. Zingale had committed disqualifying misconduct in connection with the filing of several low power television (LPTV) applications. *RKO General, Inc. (WAXY-FM)*, 4 FCC Rcd 4679 (Rev. Bd. 1989).

5. Having disqualified Cozzin, the Board held that South Jersey is preferred because it is the only qualified Richmond applicant. Because the Board believed that this proceeding should be expedited as much as possible, it did not address the basic qualifications of Gold Coast and Gold Mountain (which had been disqualified by the ALJ) or the standard comparative issue.

II. THE HUNTINGTON DOCTRINE

6. The Board concluded that the *Huntington* doctrine does not apply to Richmond. In so doing, the Board relied on the Commission's recent clarification of the *Huntington* doctrine in *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988). According to the Board, the record does not establish that Richmond and the central cities of the San Francisco-Oakland metropolitan area are interdependent--the crucial criterion under *Tuck*.

7. The Board relied on the following findings. Richmond is a community of 74,676 persons (1980 census) located 16 miles northeast of San Francisco (population 678,974) across San Francisco Bay. FCC 86D-49 at ¶¶ 37-39, 69. Richmond is an incorporated city with a council-city manager government. Its government departments provide numerous municipal services. It is part of the Richmond unified school district. Its city budget (1984-85) was $117.6 million. *Id.* at ¶¶ 48-50, 58.

8. Richmond is a significant transportation and manufacturing center containing a major seaport. *Id.* at ¶¶ 43-47, 52. Of a work force of 28,739, 8,940 work in Richmond, as compared with 2,966, who work in San Francisco. *Id.* at ¶ 54. Richmond has a number of cultural and recreational facilities, houses of worship, medi-

cal facilities, and civic and other organizations. *Id.* at ¶¶ 61-65. It is served by a daily newspaper headquartered in Pinole, another community in west Contra Costa County, and by a weekly shopper. *Id.* at ¶ 66. Richmond telephone numbers are listed in a separate west Contra Costa County telephone directory, and calls to both San Francisco and Oakland are toll calls. *Id.* at ¶ 70. Richmond's retail sales for 1984 totaled approximately $600 million. *Id.* at ¶ 56.

9. Additionally, the Board found that the record contained insufficient evidence to support a finding that Richmond residents perceived Richmond as integrally related to the San Francisco-Oakland metropolitan area and contained some evidence that they identified themselves as Richmond residents. The Board also speculated that a local radio station would allow Richmond advertisers to target the Richmond market.

10. The San Francisco applicants and the Bureau accuse the Board of ignoring matters pertinent under *Tuck* and dispute the Board's finding that Richmond is independent of the central cities of the San Francisco-Oakland metropolitan area. South Jersey's competitors assert that the evidence clearly establishes Richmond's interdependence with the San Francisco Bay Area. The Bureau finds the evidence on dependence-interdependence inconclusive and contends that the other evidence -- which favors application of the *Huntington* doctrine and the denial of any § 307(b) preference -- should govern.

11. We believe that the Board has made a creditable attempt to apply the standards set forth in *Tuck*. However, having reflected upon these novel standards generally and their application in this case, we find that a different result is warranted.[2] In *Tuck* we expressed our view that granting a dispositive preference to an applicant proposing a first local service near a metropolitan center has the potential to produce anomalous results. 3 FCC Rcd at 5374 ¶ 4. Grant of a § 307(b) preference to Richmond in this proceeding would be such an anomalous result. This is especially so since South Jersey and Cozzin seek a facility long identified as a San Francisco station and propose facilities and coverage identical to KFRC (with a main studio in San Francisco). (KFRC has been licensed to San Francisco since 1924.) Without questioning the applicants' right to propose Richmond as their community of license, we are concerned that a failure to deal realistically with the relationship between Richmond and the metropolitan area and the coverage proposed by the applicants might appear to condone an artificial and unwarranted manipulation of the Commission's policies.

12. Two of the three criteria relevant under *Tuck* strongly favor applying *Huntington* and not giving a § 307(b) preference to the Richmond applicants. [3] Under the criterion of signal population coverage, the Richmond proposals are technically identical with those of the San Francisco applicants and would serve not only the entire Bay Area, but a much larger area as well. (The proposed 0.5 mV/m contour would encompass 34,423 sq. mi. and 7,204,793 persons. Jt. Exh. 1.) *See* 3 FCC Rcd at 5378 ¶ 39.[4] (Indeed, all of the applicants propose to use the same or equivalent facilities as those currently operated by RKO. FCC 86D-49 at ¶ 8.) The criterion of size and proximity also favors applying *Huntington*. Richmond is one-ninth the size of San Francisco, and only 16 miles away. 3 FCC Rcd at 5378 ¶ 34. Richmond also lies within the San Francisco-Oakland Urbanized Area.

13. This brings us to the third criterion relevant under *Tuck*, the independence-interdependence between the smaller community and the central city of the metropolitan area. In Tuck, we stated that this criterion is the critical consideration in deciding whether *Huntington* applies to a particular case and that we would not apply *Huntington* in the absence of persuasive evidence that two communities share needs and interests. *Id.* at 5378 ¶ 34. In evaluating the critical interdependence criterion, we held that the showing required depends on the degree to which the size and proximity of the pertinent communities suggest that the community of license is simply an appendage of a large central city. *Id.* We also held -- with respect to the showing required to establish interdependence -- that we would presumptively consider the urbanized area to be the relevant metropolitan area "community" in adjudicatory cases. *Id.* at 5379 ¶ 48.[5] Here, Richmond's size and proximity to San Francisco (and Oakland) and the location of Richmond within the San Franciso-Oakland Urbanized Area are compelling indications of interdependence. The Richmond applicants would have to make a strong showing that other evidence demonstrates the independence of Richmond to avoid the conclusion that Richmond was interdependent.[6]

14. In this regard, *Tuck* indicates the type of evidence -- apart from the community's location inside or outside of the urbanized area -- relevant to the question of interdependence. We listed eight pertinent factors (although we do not mean to exclude other potentially relevant showings that applicants might propose) (3 FCC Rcd at 5378 ¶ 36):

> (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries.

15. We agree with the Mass Media Bureau (and to a large extent with Gold Coast) -- and disagree with the Board -- that the evidence relevant to these factors does not indicate that Richmond is independent of the central cities of the San Francisco-Oakland metropolitan area. In this regard, we do not credit the idea that Richmond's attributes should be considered in conjunction with areas of west Contra Costa County outside of Richmond.[7] In our view, crediting the idea of a "Greater Richmond" is inappropriate because it artificially inflates the stature of that community by investing it with the attributes of other communities and areas of the surrounding county. Rath-

er, the extent to which a community's attributes tend to merge it with surrounding areas diminishes the inference that it is an independent entity with a separate need for local broadcast service.

16. We agree with the Bureau that two of the factors relevant to the third criterion support a finding of independence. These are: Richmond has a local government and elected officials (factor 4), and Richmond has a full complement of municipal services (factor 8). Richmond App. Exh. 1 at 3 ¶ 6, 12-13 ¶ 32.

17. The evidence on the other six factors is, at best, mixed in this case. Under factor 2, whether the community has its own newspaper or other local media, we find it significant that Richmond does not have its own daily newspaper, since the daily San Francisco Chronicle and Examiner (and possibly the Oakland Tribune) have wide distribution throughout the Bay Area. San Francisco App. Exh. 1 at 61.[8] Similarly, Richmond is served by the 25 commercial radio facilities licensed to San Francisco alone and by other stations in the Bay Area, including those in Oakland, rather than by a local commercial station. FCC 86D-49 at ¶ 28.[9] Under factor 5, we find it significant that Richmond does not have its own telephone directory.[10]

18. Factor 6, whether the community has its own commercial establishments, health facilities, and transportation systems is also mixed. Richmond does have a full complement of commercial establishments. It does not, however, have a major public hospital.[11] Additionally, Richmond does not have a local public transportation system. It relies on the Alameda and Contra Costa Transit Authority for bus service and the Bay Area Rapid Transit system for rail service. San Francisco App. Exh. 1 at 39. As to factor 3, whether community leaders and residents perceive the community as separate or an integral part of the metropolitan area, we agree with the Bureau that the record does not provide a basis for a conclusion favorable to the Richmond applicants.

19. The remaining factors indicate that Richmond is not independent of the metropolitan area. Factor 1, whether community residents work in the metropolitan area rather than in the community, favors a finding of interdependence. Only 35.1 percent of Richmond residents work in Richmond. (Figures derived from Richmond App. Exh. 2 at 4.) Additionally, there is no support in the record for the idea that there might be a separate Richmond advertising market (factor 7).[12] Indeed both South Jersey and Cozzin intend to direct their programming throughout the Bay Area. FCC 86D-49 at ¶ 96. Cozzin recognizes that most advertisers likely to use the proposed facility would be from outside of Richmond. *Id.* Neither Cozzin nor Jersey proposes to locate its main studio in Richmond.

20. On balance, the mixed nature of the showing under the third criterion's eight factors is insufficient (in light of the signal population coverage together with the size and proximity of Richmond) to overcome the inference we draw -- from the presence of Richmond within the San Francisco-Oakland Urbanized Area -- that Richmond is interdependent. The fact that the applicants all propose facilities that duplicate the existing facilities of KFRC, which is licensed to serve San Francisco, also indicate metropolitan area service. Accordingly, we find that the San Francisco applicants have met their burden of showing by a preponderance of the evidence that Richmond's needs for transmission service are adequately met by stations licensed to San Francisco. We thus apply the *Huntington* doctrine to this case and will accord the Richmond applicants no § 307(b) preference over the San Francisco applicants.[13] Because we have reversed the Board as to the § 307(b) issue, we must remand this case so that the Board can rule on exceptions concerning the basic qualifications of Gold Coast and Gold Mountain and the standard comparative issue. First, however, we wish to comment briefly on the issue of Cozzin's qualifications, a matter as to which we agree with the Board. Comment is appropriate at this point because our agreement with the Board represents a final disposition of Cozzin's application in this proceeding.

III. COZZIN'S QUALIFICATIONS

21. The Board concluded that Cozzin was unqualified to be a Commission licensee because of misconduct committed by its principal Joseph T. Zingale. The Board found that Zingale was the undisclosed real-party-in-interest in 46 low power television (LPTV) applications ostensibly filed by his wife and three adult children. The Board found that Zingale had falsely signed the names of his wife and children to the applications in willful violation of 47 C.F.R. § 73.3513.

22. Cozzin challenges the Board's decision, contending that, in view of all of the circumstances and of the undisputed testimony, Zingale actually signed and filed the applications as an agent for the various family members. Our review of the record indicates that there is some substance to Cozzin's position. There is evidence, detailed by Cozzin, that the other Zingales had a genuine interest in LPTV and were not mere "flags of convenience" -- as one applicant put it -- for Zingale himself. Moreover, there is evidence in the record that Zingale signed the applications pursuant to powers of attorney provided by his family members, which he erroneously believed were appropriate to use.

23. Nonetheless, we agree with the Board that Zingale was an undisclosed real-party-in-interest and that his violation of 47 C.F.R. § 73.3513 was willful. We agree with the Board that the circumstances surrounding the filing of the applications -- especially the language of a March 2, 1984 letter written by Zingale[14] and the pattern of redundancy of the facilities specified in the applications -- indicates an intent to "stuff the ballot box" in the LPTV lottery. *See* 4 FCC Rcd at 4691-92 ¶ 58. It is also significant that Zingale was financially responsible for the applications. *See, e.g.*, RKO Exh. 31 at LPTI-9, 12 (documents showing charges for the applications). Additionally, we find that Jeffrey Nightbyrd, the president of Low Power Technology, Inc., the firm that prepared the applications for Zingale, treated Zingale as a party-in-interest. *See, e.g.*, RKO Exh. 72 at 97, 140 (testimony concerning Nightbyrd's beliefs about the Zingale applications). Thus, even if Zingale did not file the applications solely on his own behalf, he represented a community of interest including himself.

24. Similarly, even assuming that the powers of attorney proffered by Cozzin are genuine, we do not believe that they excuse Zingale's conduct. We agree with the Board that Zingale, an experienced broadcaster, who knew that the Commission had strict processing rules for LPTV, made no effort to determine whether the use of powers of attorney was appropriate or what a power of attorney should say. RKO Exh. 15 at 4; Tr. 3807, 3853-55. Zingale

did not indicate on the applications that he signed them pursuant to powers of attorney. Indeed, in the March 2, 1984 letter (to Low Power Technology, Inc.), he misleadingly suggested that the applications were signed by his wife and children.[15] A handwriting expert testified that some of the signatures had the earmarks of deliberate disguise. RKO Exh. 78. Moreover, Zingale's retention of the powers of attorney appears inconsistent with his practice of not retaining correspondence concerning Cozzin. *See* Tr. 3827, 3857-58. This evidence confirms the Board's view that the powers of attorney represent at best a self-serving gesture and that Zingale acted with deceptive intent.

IV. ORDERS

25. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Applications for Review filed July 7, 1989 by Paul J. Growald and those filed August 14, 1989 by Cozzin Communications Corporation, Gold Coast Broadcasting, Inc., and Gold Mountain Broadcasting, Inc. ARE GRANTED to the extent indicated herein and are otherwise DISMISSED as moot.

26. IT IS FURTHER ORDERED, That the decision of the Review Board FCC 89R-36 (4 FCC Rcd 4997) IS VACATED to the extent indicated herein, and that this case IS REMANDED to the Review Board for further proceedings consistent with this memorandum opinion and order.

27. IT IS FURTHER ORDERED, That the Application for Review filed July 7, 1989 by Cozzin Communications Corporation IS DENIED, and the application of Cozzin Communications Corporation (File No. BP-830512BQ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Under the bifurcated procedure adopted in the RKO proceedings, RKO's basic qualifications to hold what were originally 14 stations are being considered in the Phase I proceeding. Separate proceedings were designated to consider the qualifications of the challengers for each of RKO's facilities.

[2] In *Tuck*, we permitted the applicants to supplement their evidentiary showings to avoid the possibility of confusion caused by our articulating new standards for applying *Huntington*. We do not, however, believe that a remand to the ALJ for more evidence is necessary here. In *Tuck*, we stressed that our intent was to clarify, rather than to expand or narrow *Huntington*. 3 FCC Rcd at 5377 ¶ 28. Moreover, the factors we set forth in *Tuck* were merely illustrative and drawn from the type of evidence considered in pre-*Tuck* cases. *Id.* at 5378-79 ¶¶ 35, 40. Our examination of the record here indicates that the parties had an ample opportunity to explore the characteristics of Richmond and have developed a thorough record. The parties do not complain that the record in this case is inadequate to apply *Tuck*.

[3] Adopting the court's suggestion in New *Radio Corp. v. FCC*, 804 F.2d 756 (D.C. Cir. 1987), we held in *Tuck* that the burden of proof lies with the parties seeking to invoke *Huntington*. 3 FCC Rcd at 5377 ¶ 24.

[4] We note that the applicants propose to operate at 5 kW, the maximum power authorized for the class III channel (610 kHz) involved in this proceeding. *See* Joint Exh. 1; 47 C.F.R. § 73.21(b)(1).

[5] In *Tuck*, we announced our intention to treat urbanized areas in this manner pending the outcome of Rule Making proceedings on the subject of applying § 307(b) to urbanized areas. *See Section 307 (b) Preferences Within Metropolitan Areas*, 48 Fed. Reg. 19428 (Apr. 29, 1983). That Rule Making was terminated without substantive action. 5 FCC Rcd 399 (1990). We will, therefore, continue to treat the urbanized area as presumptively the relevant metropolitan area community and, therefore, a factor strongly tending to indicate that the suburban community is interdependent.

[6] In *Tuck*, we remanded proposals involving Garland, Texas, a community within the Dallas-Fort Worth Urbanized Area, to consider the question of interdependence. 3 FCC Rcd at 5381 ¶¶ 61-64. Garland is nearly twice the size of Richmond and is about the same distance from Dallas as Richmond is from San Francisco. Our remand in no way foreclosed the possibility that the applicants seeking to apply *Huntington* against the Garland applicants would ultimately prevail. *Id.* at 5379-80 ¶ 49. Moreover, we held that the required showing of interdependence will vary depending on the degree to which size and proximity suggest that the community is a mere appendage of the central city. Thus, in accordance with our intent in *Tuck*, to clarify rather than expand or limit *Huntington*, *Tuck* should not be construed as unduly limiting the scope of the *Huntington* doctrine.

[7] An official of the Richmond Chamber of Commerce testified that west Contra Costa County is also called "Greater Richmond." Richmond App. Exh. 1 at 17 ¶ 40, FCC 86D-49 at ¶ 67. According to that official, Greater Richmond includes the smaller communities of El Cerrito, El Sobrante, San Pablo, Hercules, Pinole, Rodeo, and Crockett. *Id.*

[8] Richmond is served, however, by the daily *West County Times*, published in Pinole, and a weekly shopper published in Richmond. *Id.* at 16 ¶ 36.

[9] Richmond has no broadcast facility. An educational FM radio station is licensed to the Richmond Unified School District in El Cerrito. FCC 86D-49 at ¶ 10. The record is inconclusive as to whether Richmond's needs are adequately served by San Francisco-based media. *Id.* at ¶ 98.

[10] There is, however, a west Contra Costa County telephone directory listing Richmond numbers, and calls to San Francisco and Oakland are toll calls. *Id.* at 17 ¶ 39.

[11] Evidence from the Richmond Chamber of Commerce lists several smaller medical facilities in Richmond plus Brookside Hospital, a major public hospital in neighboring San Pablo. Richmond App. Exh. 1 at 13 ¶ 33; Richmond App. Exh. 3 at 10-12; FCC 86D-49 at ¶ 64. An official of the Association of Bay Area Governments testified on behalf of the San Francisco applicants that Richmond had only a private hospital and a small public hospital. San Francisco App. Exh. 1 at 60.

[12] Standard industry sources recognize a San Francisco radio market encompassing over four million persons. J. DUNCAN, JR., DUNCAN'S RADIO MARKET GUIDE (1989 ed.) (official notice taken). This makes it unlikely that a station with wide-area coverage could serve as a "Richmond radio market" facility in any meaningful sense.

[13] In order to avoid any possible confusion concerning our holding in *Tuck*, we take this opportunity to make clear that an applicant proposing to serve a lesser community within an urbanized area will not be able to establish that community's independence merely by showing the existence of a local government and ancillary municipal services.

[14] "I have circled twenty-four stations that I would like to apply for on the individual pages of the cut off list. Please use two different names on each of the twenty-four applications." RKO Exh. 29.

[15] "Enclosed please find signed, FCC forms by Mary Jo, Tom, Nancy and Rozanne Zingale. There are twelve signed copies by each of them." RKO Exh. 29. *See also* Tr. 3817-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM, a General Partnership — File No. BPCT-850320KG

BLANCO COMMUNICATIONS LTD. — File No. BPCT-850320LC

For a Construction Permit for a New Television Station at Blanco, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1990; Released: May 24, 1990

By the Commission:

1. Before the Commission are: (1) a Petition for Partial Reconsideration filed March 2, 1989 by Dorothy O. Schulze and Deborah Brigham, a General Partnership; and (2) a Petition for Reconsideration filed July 5, 1989 by Blanco Communications, Ltd. Schulze-Brigham and Blanco seek reconsideration of *Opal Chadwell*, 4 FCC Rcd 1215 (1989). That memorandum opinion and order, in pertinent part, upheld a Review Board Decision denying applications by Schulze-Brigham and Blanco for a new UHF television station.

I. BACKGROUND

2. Schulze-Brigham, Blanco, and an individual named Opal Chadwell filed mutually exclusive applications for a new UHF television station on channel 52 in Blanco, Texas. The Review Board, affirming an initial decision by Administrative Law Judge Walter C. Miller, granted Chadwell's application and denied those of Schulze-Brigham and Blanco. *Opal Chadwell*, 1 FCC Rcd 120 (I.D. 1986), aff'd, 2 FCC Rcd 5502 (Rev. Bd. 1987). The Board held that both Blanco and Schulze-Brigham had made disqualifying misrepresentations during the course of the hearing.

3. According to the Board, Blanco's principal, Sidney Paul DuBose, lied in his testimony describing dealings he had with Opal Chadwell concerning her proposed transmitter site. The Board also found that Schulze-Brigham's principal, Dorothy O. Schulze, was responsible for misrepresentations as to two matters. First, the Board found that she had condoned false testimony by her witness, Ron Baptist, about her transmitter site in another proceeding. Additionally, the Board found that she had falsely testified that she -- and not her brother, Richard Ozan -- was the moving force behind the Blanco and other applications she had filed.

4. On appeal, the Commission found no error in the Board's treatment of the existing record as to the qualifications of Schulze-Brigham and Blanco. *Opal Chadwell*, 4 FCC Rcd 1215 (1989). The Commission also found, however, based on the submissions of the parties, that a substantial question existed as to Chadwell's financial qualifications. The Commission therefore remanded the case to the ALJ for further hearings. During the preliminary phase of the remanded hearings, Chadwell failed to participate in discovery. As a result, the ALJ dismissed her application and terminated the proceeding. *Opal Chadwell*, FCC 89M-1568 (Jun. 2, 1989).

5. In the pleadings now before us, Schulze-Brigham and Blanco contend that recent events warrant reconsideration of their disqualification. These events assertedly undermine the validity of the ALJ's credibility findings adverse to these parties.

II. SCHULZE - BRIGHAM'S PETITION

6. Schulze-Brigham contends that a recent action in another proceeding undermines the basis on which Schulze-Brigham was disqualified because it calls into question the validity of the presiding judge's evaluation of the credibility of key witnesses.

7. The ALJ in this proceeding heard testimony regarding the question of whether Schulze-Brigham's principal, Dorothy O. Schulze, misrepresented her role in this and other broadcast applications. The ALJ concluded that Schulze had been a "front" for her brother, Richard Ozan, who was the real-party-in-interest in the questioned applications. *Opal Chadwell*, 1 FCC Rcd 120, 126 ¶ 76, 130-31 ¶¶ 13-14 (I.D. 1986). In reaching this conclusion, the ALJ rejected the testimony not only of Schulze but also of JoAnn Garcia, an applicant for a new television station in Conroe, Texas. Garcia testified that she and Schulze were bona fide applicants in their respective communities. The ALJ concluded that Garcia too had been a front for Ozan and that her attempt to corroborate Schulze's version of events was "sheer fabrication" and "a web of lies." *Id.* at 124 ¶ 55, 126 ¶ 69. The Review Board and the Commission upheld the initial decision. *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), rev. denied, 4 FCC Rcd 1215 (1989).

8. Subsequently, a second ALJ ruled on a real-party-in-interest issue against Garcia's application in the Conroe, Texas proceeding. *DLBS, Inc.*, 3 FCC Rcd 6710 (I.D. 1988). This issue involved the same material facts as the issue in Blanco except that it was centered on Garcia's application (that of G-A Communications, Inc.) rather than Schulze-Brigham's Blanco application. The Conroe ALJ resolved this issue favorably to Garcia, finding that Ozan was not the real-party-in-interest. He also found that Garcia's testimony was "believable, essentially uncontradicted, and is credited here." *Id.* at 6721 ¶¶ 142-43.

9. Schulze-Brigham contends that the findings of the Conroe ALJ cast doubt on the reliability of the Blanco ALJ's credibility findings and urges the Commission to reconsider its reliance on these findings. Meanwhile, however, additional events have transpired, in that the Conroe proceeding was appealed to the Board. The Board considered the need to reconcile the disparate findings made in

the Blanco and Conroe proceedings. It concluded that the most appropriate course of action would be to remand the Conroe proceeding so that the Conroe ALJ could explicitly consider the veracity of Garcia's testimony in the Blanco proceeding. *Imagists*, 4 FCC Rcd 3749, 3751-52 ¶¶ 9-13 (Rev. Bd. 1989). The Board indicated that it would give customary deference to the Conroe ALJ's credibility findings even if they differ from those of the Blanco ALJ. *Id.* at 3751 ¶ 12. Pursuant to the Board's directive, the Conroe ALJ has conducted hearings and will issue a supplemental initial decision in due course.

10. In view of Schulze-Brigham's contentions, it may become necessary for the Commission to examine the discrepancy between the findings made in the Blanco and Conroe cases. The Board's action, however, makes it premature for the Commission to address questions regarding Garcia's testimony at this time. In order to preserve the status quo if it should become necessary to reexamine this matter, we will, on our own motion, stay our previous memorandum opinion and order to the extent that it denies Schulze-Brigham's application until such time as the Board issues a decision in the Conroe proceeding regarding Garcia's veracity. Additionally, we will hold Schulze-Brigham's petition in abeyance during that period. After the Board issues a decision in the Conroe proceeding, Schulze-Brigham may supplement its petition to bring its arguments up-to-date. We will then have the two proceedings before us simultaneously, and we can then take whatever action appears appropriate.

11. A related matter requires comment. As previously mentioned, in addition to denying the applications of Schulze-Brigham and Blanco Communications, the Commission remanded the application of Opal Chadwell for further hearings concerning her financial qualifications. Schulze-Brigham asks the Commission to clarify its right to participate in the remanded hearing. The ALJ, however, has since dismissed Chadwell's application for nonprosecution. *Opal Chadwell*, FCC 89M-1568 (Jun. 2, 1989). Thus, Schulze-Brigham's petition is moot as to this point. In any event, the matter is moot because the ALJ permitted Schulze-Brigham to participate.

III. BLANCO'S PETITION

12. The questions regarding Blanco's qualifications arose from a dispute between Blanco's principal Sidney Paul DuBose and Chadwell regarding Chadwell's proposed transmitter site. Chadwell testified that DuBose had falsely indicated to her that he owned the land on which her proposed transmitter site was located and later falsely assured her that he would furnish a letter authorizing her to use the site. Instead, DuBose filed his own competing application against Chadwell and sought a site availability issue against her (because she had not sought permission from the true owner of the site).

13. The ALJ credited Chadwell's testimony and rejected DuBose's testimony denying that: (1) Chadwell showed him the location of her proposed antenna site; (2) he indicated that the site belonged to him; (3) Chadwell asked him to provide a letter of reasonable assurance for using the site, and he indicated that he would provide such a letter, and (4) he knew, after Chadwell filed her application, that she had specified a site that she thought was on his ranch. The ALJ found that Chadwell's testimony was "basically consistent and corroborated by her husband's sworn testimony" [which the ALJ also found credible] and that there "is no reason for not crediting her version of the past events." 1 FCC Rcd at 121 ¶ 10. As to DuBose, the ALJ was not favorably impressed. The ALJ found: "His answers didn't fit together. He was weak on details, and his sense of recall was incredibly poor." *Id.* The Board (and ultimately the Commission) deferred to these credibility findings in affirming the initial decision. 2 FCC Rcd at 5504 ¶ 13.

14. Blanco argues that Chadwell's conduct in the remanded hearing casts doubt on her veracity. Blanco points out that the Commission anticipated that further exploration of Chadwell's financial qualifications might indicate that she falsely certified that she was qualified and that she proffered certain documents purportedly establishing the value of her assets in bad faith. As to this matter, the Commission held:

> However, if the record on remand indicates that Chadwell has falsely certified her financial qualifications or has lacked candor, this may reflect on her credibility under other issues and the ALJ might reconsider his findings if appropriate. Again, however, we emphasize that we are not prejudging this matter, but merely indicating that the ALJ has the discretion to act *if* circumstances warrant.

4 FCC Rcd at 1217 ¶ 21. (Emphasis in the original.) Blanco notes that pursuant to the Commission's observation, the ALJ added false certification and lack of candor issues against Chadwell. *Opal Chadwell*, FCC 89M-422 (Feb. 8, 1989). Chadwell, in failing to prosecute her application after these issues had been added, failed to resolve these questions in her favor. In Blanco's view, this failure warrants reconsideration of Chadwell's credibility.

15. Blanco also observes that in dismissing Chadwell's application, the ALJ found that Chadwell abused the Commission's processes by instructing witnesses not to appear for scheduled depositions. FCC 89M-1568 at ¶ 10. According to Blanco such conduct reflects adversely on Chadwell's character and hence on her credibility.

16. Blanco contends that the new circumstances involving Chadwell, viewed in conjunction with the existing record, justifies reversing the adverse conclusions against DuBose drawn by the ALJ and the Board. At minimum, Blanco asserts that it should be permitted to introduce further evidence to impeach Chadwell's veracity.

17. The recent events noted by Blanco do not in themselves justify reconsideration of Blanco's qualifications. As the previously cited language indicates, in remanding this proceeding, we merely recognized that further information developed in the hearing *might* warrant a reconsideration of Chadwell's credibility. In fact, no further hearings as to Chadwell's financial qualifications were completed, and no additional findings were made concerning Chadwell. Additionally, although the ALJ found that Chadwell abused the Commission's processes, this matter was not the subject of an evidentiary hearing.

18. Additionally, we would not ordinarily authorize further hearings only for the purpose of exploring Chadwell's credibility as Blanco requests. Commission hearings are generally governed by the Federal Rules of Evidence. 47 C.F.R. § 1.351. (The rules may be relaxed, however, if "the ends of justice will be better served by so doing.") These rules provide that specific instances of a witness' conduct may not be proved by extrinsic evidence

solely for the purpose of attacking the witness' credibility (although the matter may be inquired into on cross examination of the witness at the court's discretion). Fed.R.Evid. § 608(b). Section 608(b) reflects the dangers of confusion, prejudice, and waste of time inherent in a "mini-trial" on the credibility question. *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 605 (7th Cir. 1985). Thus, under the rule, while evidence introduced under the Chadwell financial issues might have impeached her credibility generally, evidence cannot be introduced solely for that purpose. *See United States v. Ferrell*, 625 F.Supp. 41, 44 (E.D. Pa. 1985), aff'd without opinion, 815 F.2d 694 (3rd Cir. 1987).

19. Nevertheless, we believe that Blanco has justified pursuing the matter of Chadwell's credibility to a limited extent. We believe that this approach is warranted, because (1) Blanco did not have the opportunity to cross-examine Chadwell as to possible misrepresentations and abuse of process, as the rule contemplates, and (2) we do not think it fair to leave matters solely under Chadwell's control.

20. We believe that the question of whether or not recent events undermine Chadwell's credibility vis-a-vis DuBose should be referred to the ALJ. The ALJ heard the witnesses and is therefore in the best position to determine in the first instance whether recent events alter their credibility. In this regard, Chadwell's failure to prosecute also occurred directly before the ALJ.[1]

21. Thus, the ALJ should give Blanco the opportunity to cross-examine Chadwell at hearing as to her financial showing and the reasons for her failure to prosecute. This cross-examination will also allow the ALJ to make additional demeanor findings. So that Blanco can prepare for the hearing session, the ALJ should permit Blanco to take the depositions of Chadwell and other relevant witnesses. The ALJ should also give Blanco the opportunity to subpoena relevant documents, including those authored by Chadwell, which could be introduced into evidence to impeach Chadwell's credibility consistent with the Federal Rules of Evidence (if Chadwell does not deny the documents' authenticity). *See Carter v. Hewitt*, 617 F.2d 961, 969-70 (3rd Cir. 1980).[2] The ALJ should then issue a supplemental initial decision containing his findings and conclusions. The supplemental initial decision will be subject to review by the Board, which, like the ALJ, will have the advantage of its previous review of the record.

IV. ADDITIONAL MATTERS

22. Two additional matters require attention in light of our actions herein. In his order dismissing Chadwell's applications for nonprosecution, the ALJ terminated the proceeding and returned channel 52 to the TV processing line. FCC 89M-1568 at ¶ 11. It is now apparent that further proceedings remain to be conducted in this case. We will therefore vacate that aspect of the ALJ's order. Additionally, Blanco and Schulze-Brigham have filed pleadings before the Board covering the matters we have resolved here. We will direct the Board to dismiss those other pleadings.

V. ORDERS

23. ACCORDINGLY, IT IS ORDERED, That the memorandum opinion and order of the Commission, FCC 89-7 (Jan. 31, 1989) (4 FCC Rcd 1215), IS STAYED to the extent set forth in paragraph 10, above; and that the Petition for Partial Reconsideration filed March 2, 1989 by Dorothy O. Schulze and Deborah Brigham, a General Partnership IS HELD IN ABEYANCE subject to being supplemented in accordance with paragraph 10, above.

24. IT IS FURTHER ORDERED, THAT the Petition for Reconsideration filed July 5, 1989 by Blanco Communications, Ltd. IS GRANTED to the extent indicated herein and otherwise IS DENIED; that the memorandum opinion and order of the Commission, FCC 89-7 (Jan. 31, 1989) (4 FCC Rcd 1215), IS SET ASIDE to the extent that it denies the application of Blanco Communications, Ltd. (*id.* at ¶ 23); and that this docket, in part, IS REMANDED to the presiding judge for further proceedings consistent with paragraphs 20-21, above.

25. IT IS FURTHER ORDERED, That the memorandum opinion and order of Administrative Law Judge Walter C. Miller, 89M-1568 (Jun. 2, 1982), IS VACATED to the extent that it declares this proceeding terminated and returns channel 52 to the TV processing line.

26. IT IS FURTHER ORDERED, That the Review Board IS DIRECTED to dismiss the pleadings referred to in paragraph 22, above, as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Blanco suggests that Chadwell's failure to prosecute gives rise to an inference that the evidence would be adverse to her. Cf., for example, *United States v. Ariza - Ibarra*, 651 F.2d 2, 15-16 (1st Cir. 1981), cert. denied, 454 U.S. 895 (1981) (inference where party fails to call witness).

[2] We recognize that in view of recent events, there is a risk that some individuals may not cooperate in these further proceedings. Appropriate remedies, however, are available. *See*, for example, 47 C.F.R. § 1.340 (use of courts to enforce a subpoena).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN PIONEER	File Nos. I-T-C-90-056
TELEPHONE OF	I-T-C-90-057
TEXAS, INC.	I-T-C-90-058
LDDS OF ALABAMA, INC.	I-T-C-90-059
LDDS OF ARKANSAS, INC.	I-T-C-90-060
LDDS OF INDIANA, INC.	I-T-C-90-061
LDDS OF KANSAS CITY, INC.	I-T-C-90-062
LDDS OF KENTUCKY, INC.	I-T-C-90-063
LDDS-II, INC.	I-T-C-90-064
COM-LINK 21 INC.	
LDDS OF TENNESSEE, INC.	

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 17, 1990; Released: May 24, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 7, 1990 by the captioned companies (subsidiaries of LDDS Communications, Inc. (LDSS)), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on February 21, 1990. No comments were received.

2. The subsidiaries of LDDS are non-dominant domestic resale common carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by the subsidiaries of LDDS.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-056 thru I-T-C-90-064, ARE GRANTED, and the applicants are authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. IT IS FURTHER ORDERED that the Section 214 authorizations granted to Inter-Comm Telephone, Inc. in File No. I-T-C-87-092 (released May 21, 1987) and Telcor, Inc. d/b/a TMC of Louisville in File No. I-T-C-88-101 (released June 7, 1988) are hereby cancelled.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062 Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Ameritech Operating Companies

Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1990; Released: May 24, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 6, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] the Ameritech Operating Companies (Ameritech) filed a plan to provide Comparably Efficient Interconnection (CEI) for enhanced protocol processing services, stating that it wishes to provide protocol processing without structural separation. In this Order, we approve the plan subject to certain conditions.

II. SERVICE DESCRIPTION

2. Ameritech requests authority to provide a variety of enhanced protocol processing services designed to allow communications between customer premises equipment (CPE) using dissimilar protocols.[2] Ameritech states that it will provide these services on an unseparated, collocated basis in connection with three different classes of underlying basic services: (1) exchange telephone service; (2) private line service; and (3) the Ameritech Packet Switched Network (APSN). [3] Ameritech also proposes to add additional protocols to its offering as new technologies become available.[4] In addition, Ameritech seeks permission to engage in joint marketing of enhanced protocol processing services and its underlying basic services, although customers will order the underlying basic services separately from the Ameritech Companies' exchange and access tariffs.

III. CEI REQUIREMENTS

3. Ameritech also describes its plans to satisfy our CEI requirements described in the *Phase I Order*.[5] Ameritech states that it will take the underlying basic services used in providing these protocol processing services at the same tariffed rates charged other enhanced service providers (ESPs), and will provide identical basic service functionalities to all ESPs. Ameritech states that the underlying basic services used in providing protocol processing services are available to all users on a non-discriminatory basis in existing tariffs on an unbundled basis.[6] Ameritech adds that it will provide all protocol processing service vendors with identical capabilities for end user access to their offerings. Ameritech notes that interconnection to its enhanced protocol processing service will be through standard published interfaces that are available to other ESPs on the same terms and conditions. Ameritech also states that it will use the provisioning, installation, maintenance and repair procedures that the Commission approved in its ONA plan. Ameritech adds that it will comply with the requirement that it minimize transport costs by charging its unaffiliated ESPs the same tariffed rates as non-collocated ESPs for all underlying basic services. Pursuant to the Commission's *BOC ONA Order*, when rates include a distance-sensitive element, Ameritech will apply rates based on the imputed minimum distance established by the Commission.

A. Other CEI Requirements

4. Ameritech also describes how it will comply with the other non-structural safeguards described in the *Phase I Order*.[7] Ameritech states that after plan approval it will update its Cost Allocation Manual to include these enhanced protocol processing services.[8] Ameritech adds that it will satisfy the Customer Proprietary Network Information (CPNI) requirements in the same manner described in its May 19, 1989 Amended ONA Plan.[9] Finally, Ameritech states that it will comply with the Commission's network information disclosure requirements if any changes to existing network interfaces are necessary in the future, although its plan does not propose any such changes.

IV. DISCUSSION

5. Based on our review of the plan and the lack of opposing comments,[10] we conditionally approve Ameritech's plan to offer CEI to providers of enhanced protocol processing services described herein. We find that Ameritech has shown that it will comply with the CEI parameters, other non-structural safeguards, and our CEI pricing requirements.[11]

V. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, Ameritech's Plan to provide comparably efficient interconnection to providers of enhanced protocol processing services described herein, IS APPROVED, subject to the condition described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Commission's decision in *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an unseparated basis prior to implementation of Open Network Architecture (ONA) to submit and obtain approval of a CEI plan for the specific service, or class of services, it proposes to offer. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 16, 1988).

[2] *Id.* at Appendix B. Ameritech is presently authorized to provide asynchronous to X.25 and X.75 protocol conversion services in conjunction with APSN. *Id.* at 4, n. 5. Ameritech will continue to provide these protocol conversion services pursuant to the pre-existing authorizations.

[3] APSN provides basic packet switching services within the Ameritech local access and transport areas (LATAs) and allows access to enhanced service providers and national and international packet networks. Plan at 6.

[4] Ameritech states that additional protocols "will be offered consistent with the provisions of this plan" and will be "provided only in conjunction with the basic services specified in this plan." *Id.* at 4.

[5] *Id.* at 7-13.

[6] Although the majority of underlying basic services used in connection with the enhanced protocol processing services are available in all Ameritech central offices, Ameritech notes that the availability of APSN is limited to certain areas. Ameritech states that it intends to expand the availability of APSN where there is sufficient demand for the service. *Id.* at 11-12.

[7] *Id.* at 13-15.

[8] Ameritech states that it will amend its Cost Allocation Manual at least sixty days before offering any of the protocol processing services covered by this plan. *Id.* at 13.

[9] The *BOC ONA Amendment Order*, CC Docket No. 88-2, Phase I, Filing and Review of Open Network Architecture Plans, FCC No. 90-135, rel. May 8, 1990, discusses in detail a number of CPNI issues and requires that all of the BOCs amend their ONA Plans to conform to these requirements. Approval of Ameritech's plan is conditioned on its compliance with the CPNI requirements of the *BOC ONA Amendment Order*. Ameritech is also to comply with any other revisions to our ONA requirements adopted in the *BOC ONA Amendment Order* and the *ONA Reconsideration Order*, CC Docket 88-2, Phase I, Filing and Review of Open Network Architecture Plans, FCC 90-134, rel. May 8, 1990.

[10] No parties commented on the Plan.

[11] *See* para. 3 *supra*. and *Phase II Reconsideration*, 3 FCC Rcd 1150, at 1155.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ROCHESTER TELEPHONE MOBILE COMMUNICATIONS — File No. 03301-CL-MP-89

For Authority to Modify the License for Station KNKA297 in the Domestic Public Cellular Radio Telecommunications Service at Rochester, New York, MSA 034-B

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1990; Released: May 25, 1990

By the Chief, Mobile Services Division:

1. Rochester Telephone Mobile Communications (Rochester), the Block B cellular licensee in the Rochester, New York Metropolitan Service Area (MSA), has filed an application to modify two cells of Station KNKA297 and to increase its Cellular Geographic Service Area (CGSA) within the MSA up to the MSA boundary. The cell site modifications would cause some extension of the 39 dBu contours outside the MSA. The captioned application was placed on public notice on June 28, 1989. On July 31, 1989, a Petition to Deny was filed by Genesee Telephone Company (Genesee), the Block A cellular licensee in the Rochester MSA. Responsive pleadings have been filed.

I. ROCHESTER'S REQUESTS

2. Rochester proposes to change two of its cell sites in such a way that a portion of each of the 39 dBu contours will extend into neighboring Rural Service Areas (RSAs). First, it proposes to change its cell site #3 antenna location from Parma to Brockport, New York. This change will cause an extension of the 39 dBu contour of this cell beyond the MSA boundary. Rochester's justification for this extension is that the antenna relocation is necessary to improve unacceptable service in this portion of the MSA, and that the MSA boundary is irregular along the Monroe/Genesee/Orleans County line, making it impossible to adequately serve MSA customers in this area without some overlap into the adjacent RSA.

3. Second, Rochester proposes to make cell site #1 antenna at Barre, New York less directional. This change will cause an extension of the 39 dBu contour beyond the MSA boundary. Rochester's justification for the extension is that the portion of the MSA which the new antenna configuration is designed to serve is relatively small and of a rectangular shape, and the average ground elevation slopes upward towards the MSA border. These factors, argues Rochester, require some 39 dBu contour overlap into the RSA to improve service within this portion of the MSA. Rochester further argues that the extension is a by-product of its effort to serve Medina, New York and to cover major highways in the western portion of the MSA.

II. GENESEE'S CONTENTIONS

4. Genesee does not oppose Rochester's proposed change of location for cell site #3, but it does oppose Rochester's proposed modification of its cell site #1. Genesee argues that Rochester's application should be dismissed or, in the alternative, the application should be designated for an evidentiary hearing on the grounds that "there is a substantial and material question as to whether grant of Rochester's application would serve the public interest, convenience, and necessity." Petition at 3. In support of its requested relief, Genesee argues that Rochester's proposed antenna modification at Barre will result in a more than *de minimis* extension of the 39 dBu contour into the adjacent New York-3 RSA, market number 561. Genesee argues that the extension is greater than *de minimis* because the extension area comprises 11.7% of the total area covered by this cell, or 43 square miles, and that the population inside the proposed extension area is 2,392. Genesee argues that Rochester's justification for this extension, to cover the city of Medina inside the MSA, is unfounded because the extension does not cover any part of Medina.

5. Genesee further argues that if the Commission grants Rochester's Barre modification application, Genesee will be at a competitive disadvantage in its ability to extend service to the New York 3 RSA. Genesee points out that incorporating this RSA into the Rochester MSA, will be an important marketing goal, and that because Rochester is a wireline, it has much better odds of winning the lottery for New York 3 than does Genesee. Accordingly, argues Genesee, Rochester will enjoy a "substantial headstart over Genesee in its ability to extend service into the New York 3 RSA, if indeed Genesee is ever able to do so." Petition at 3. With Rochester's antenna modification at Barre, Genesee argues, Rochester is in a position to further increase its competitive advantage "by prematurely extending service contours" into the New York 3 RSA. *Id.*

III. DISCUSSION

6. A proposed 39 dBu contour extension outside an MSA may be acceptable if it does not enter into a central MSA, if the applicant has justified the extension in its application, and if the extension is *de minimis*.[1] Whether or not an extension is *de minimis* depends upon such factors as the percentage size of the extension relative to the total size of the MSA,[2] whether the extension is the by-product of a system designed to cover areas inside the MSA rather than a system designed to reach areas outside the MSA, [3] and whether the border of the MSA in the vicinity of the 39 dBu contour extension is irregular in shape.[4]

7. The extensions proposed by Rochester do not enter into a central MSA, nor do they cover population centers or major highways in the neighboring RSA. Moreover, Genesee's argument of potential economic harm to it is speculative and provides no valid basis for denying the requested extension even if we assumed Genesee's allegation to be true.

8. Rochester's justification for its proposed 39 dBu contour extension at cell site 1 includes the statement that:

> [T]his area of the MSA . . . is relatively small and rectangular in shape . . . and the average ground elevation slopes up toward the southern MSA/RSA border, combining to make it impossible to serve the majority of this part of the MSA without some overlap into the adjoining RSA . . . . This *de minimis* extension is necessary to provide service within the MSA to the City of Medina, New York and to cover the portions of Routes 31 and 104 in the western portion of the Rochester, New York MSA.

The explanations submitted by Rochester have justified the grant of *de minimis* extensions in the past. *See* notes 2, 3, and 4, *supra*. Furthermore, we reject Genesee's argument that because the 39 dBu contours do not cover the city of Medina, Rochester cannot claim that its extension is intended to "provide service within the MSA to the City of Medina." Although it is true that the 39 dBu contours do not reach Medina, Rochester explains that the bulk of population density within the proposed contour expansion lies between the city of Rochester and the city of Medina, and that requests from its customers indicate that the main need for cellular service is on the roads leading to Medina, not within the city of Medina itself. Thus, we find that Rochester has adequately explained the reason for the requested extension.

9. We turn next to a consideration of whether or not the size of the contour extensions are *de minimis*. The total 39 dBu contour extension for cell sites #1 and #3 combined[5] is 2.4% of the MSA area. This percentage falls well within the size of *de minimis* extension granted in the past. *Saco River Cellular Telephone Company, supra*. Moreover, as discussed above, it appears that Rochester designed its system for better coverage within the MSA and the extensions are a by-product of that design. Finally, the irregular boundary and sloping terrain further justify the extension for cell site #1.

10. Genesee's argument that Rochester will have a "substantial headstart over Genesee" in beginning service to the neighboring New York 3 RSA "if indeed Genesee is ever able to do so," is not properly raised in this proceeding. Arguments concerning a wireline's "headstart" in a given service area may be raised only in the licensing proceedings involving that service area. *See Rural Cellular Service Area*, 4 FCC Rcd 2440, 2442 and n. 12 (1988). In this proceeding, we are considering only the question of a *de minimis* extension into the New York 3 RSA. Genesee has presented no arguments in this proceeding to persuade us that grant of Rochester's *de minimis* extension request would not be consistent with established Commission precedent and policy.

11. Furthermore, we find that Genesee has not justified its request for a hearing because it has not placed into issue any material facts which might demonstrate that grant of the subject application would not be in the public interest. *See generally Astroline Communications Company Ltd. Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988). Furthermore, we find Rochester to be legally, financially, and technically qualified to construct and operate the system proposed in the captioned application.

IV. ORDERING PARAGRAPHS

12. WHEREFORE, IT IS HEREBY ORDERED that the application of Rochester Telephone Mobile Communications, File No. 03301-CL-MP-89, IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Rochester, New York MSA and is conditioned on coordinating with the current and future co-channel licensees in the area outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to the extension.

13. IT IS FURTHER ORDERED that the Petition to Deny filed by Genesee Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.903(a) states in pertinent part:

> No CGSA . . . may extend beyond the boundaries of the MSA . . . except where any such extensions are *de minimis* and do not include areas within another central MSA . . .

See also Procedures Update, 52 Rad. Reg. 2d (P&F) 725, 726 (Public Notice, November 1, 1982), *aff'd, Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984):

> . . . . Minor overlap of 39 dBu contours. . . into another central SMSA will not render an application defective, provided that the application includes a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA). . . .

[2] *Saco River Cellular Telephone Company, supra*. 62 Rad. Reg. 2d (P&F) 999 (Mob. Serv. Div. 1987).

[3] *Metro Mobile CTS of Charlotte, Inc.*, 2 FCC Rcd. 3929 (Mob. Serv. Div. 1987); *Alltel Cellular Associates of the Carolinas*, 61 Rad. Reg. 2d (P&F) 225 (Com. Car. Bur. 1986).

[4] *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987).

[5] The extension area of cell site #1 is overlapped by about 50% of the extension area of cell site #3. Taken alone, the extension area of cell site #1 is slightly less of a percentage of the total MSA than when the two cell site extensions are combined.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RAM COMMUNICATIONS OF MICHIGAN, INC. File No. 24686-CD-P/ML-01-88

For authority to construct additional facilities in the Public Mobile Service on operating on frequency 152.24 MHz for Station KQD303 at New Baltimore, Michigan

MEMORANDUM OPINION AND ORDER

Adopted May 18, 1990; Released: May 24, 1990

By the Chief, Mobile Services Division:

1. The captioned application of RAM Communications of Michigan, Inc. ("RAM"), which proposed to add a frequency 152.24 MHz one-way facility in the Public Mobile Service ("PMS") at New Baltimore, Michigan, to improve coverage northeast of Detroit, was granted by the Commission. *See Public Notice*, Rpt. No. PMS-89-17-A, Mimeo No. 1331 (released Jan. 25, 1989). Port City Communication, Inc. ("Port City"), licensee of PMS Station KUD204, which provides one-way paging service on frequency 152.24 MHz at Port Huron, Michigan, filed a "Petition for Reconsideration" of the grant of RAM's application.

2. In its petition, Port City claims that RAM's application provides an erroneous co-channel interference analysis and that RAM's proposal would cause harmful co-channel interference to Port City's existing Port Huron operation. Port City claims that the required ratio between the desired and undesired signals for Port City's Station KUD204 in relation to RAM's facility is 21.6 dB whereas RAM's computed ratio is only 21.2 dB. Therefore, the desired-to-undesired ratio is 0.4 dB below the required minimum, thus indicating harmful interference to Port City's Huron facility. Accordingly, Port City requests that the grant of RAM's captioned application be set aside and dismissed pursuant to Sections 22.15(b) and 22.100(a) of the Rules.

3. RAM subsequently filed FCC Form 489 notifying the Commission of its completion of construction as modified by certain changes as set forth in an exhibit to the Form 489. Specifically, RAM states that the modifications have decreased its effective radiated power from 262.5 watts to 208.4 watts, decreased the transmitter output power from 133.0 watts to 118.5 watts, and changed the system losses by adding connectors and a lightning arrester. RAM states that these equipment changes have resulted in a 0.5 dB reduction in effective radiated power which has eliminated any potential for harmful co-channel interference. RAM says that its modifications have not increased the 43 dBu reliable service area contour of its subject facility in any direction, thereby rendering its modifications minor pursuant to Section 22.9(d)(6) of the Rules.

4. After considering Port City's petition, RAM's response and modifications, we conclude that RAM's application as modified will not cause interference to Port City.

5. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Port City Communication, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMERICAN CELLULAR SERVICES U.S. File No. 10763-CL-P-645-A-89

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Tennessee-3 (Macon) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted May 17, 1990; Released: May 25, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. American Cellular Services U.S. (American), a partnership, is the tentative selectee for the Tennessee-3 RSA. *See* Public Notice, Report No. CL-90-61 (released December 12, 1989), *corrected*, Report No. CL-90-61-A (released December 13, 1989). On February 1, 1990 Vivian E. Warner (Warner) filed a "Petition to Deny or Designate for Hearing." On February 20, 1990 Warner filed a "Supplement to Petition to Deny or Designate for Hearing." American has filed a Reply to Warner's pleadings.

II. THE PETITION

A. REAL PARTY IN INTEREST

2. Warner, who is an attorney, was an applicant for the Tennessee 3 authorization and is a resident of the area included in this RSA. Warner seeks to have American's application denied or designated for hearing. She alleges that Wladimir Naleszkiewicz, who is not named as one of American's partners, is the real party in interest behind the application. In support of this charge, Warner relies on a letter dated June 22, 1989 addressed to Tony Ross from Robert A. Burka an attorney writing on behalf of Genesis Enterprises, Ltd., a company owned by Naleszkiewicz. The letter was initially filed at the Commission by American on October 27, 1989 as part of an amendment to its application. Burka's letter advised Ross that he owed $14,560 for his purchase of a 10% interest in American; he had already paid $17,000. The letter indicates that Ross' "revised interest" would be 5.386%. The letter goes on to say:

> Lastly, this letter, as Wlad Naleszkiewicz may have told you, reflects your technical legal rights in the current situation. It may well turn out that Wlad may be able to increase your share notwithstanding the lack of full payment in view of your appreciated service as managing general partner. Any decision along those lines will have to await further discussions with Wlad, who will have to make the final decision.

Warner claims that Naleszkiewicz's control of American continued after the lottery. She refers to a letter from Naleszkiewicz to American in which American is told about the need for FAA clearance. The letter, dated November 16, 1989, indicates that the FAA clearance will be handled by Genesis as part of its responsibilities under its services agreement with American.

3. Finally, Warner relies upon provisions in American's partnership agreement, a copy of which was filed with the Commission by American on October 27, 1989, to support her claim that Naleszkiewicz is the real party in interest behind American's application. The substance of Warner's allegations are unclear. She states that: $330,000 has been contributed to the partnership (Section 5.01); "however" Tony Ross is to have signatory authority over the partnership's checking account (Section 8.03) "despite the fact" that American's money was controlled and spent by Naleszkiewicz. Warner did not provide a basis for her conclusion that Naleszkiewicz was in control of American's assets. Warner also alleges that Naleszkiewicz allocated partnership interests without regard to the amount of the money contributed. Warner points out that one partner received a 3% interest for a $4,000 contribution, while another contributed $16,500 and received only a 5% interest. All this, according to Warner, raises real party in interest questions requiring a hearing to investigate American's qualifications to be a Commission licensee.

III. THE SUPPLEMENT

A. SITE AVAILABILITY

4. In her Supplement to Petition to Deny or Designate for Hearing (Supplement) Warner alleges that American does not have a reasonable assurance of the availability its proposed antenna site for cell 5. In support of this allegation Warner submitted her own affidavit in which she states that she contacted the owner of the site, James Martin, and is "convinced that no one has reasonable assurance to use of his property as a cellular tower site." Warner prepared a draft affidavit for Mr. Martin to sign and submitted her draft with the supplement. However, a signed copy of the Martin affidavit has not been filed.

B. FAILURE TO DISCLOSE OWNERSHIP

5. Warner notes that a general partnership, Applied Business Research (ABR), is listed as having a 3% ownership interest in American. However, American has not identified ABR's partners who, according to Warner, are undisclosed real parties in interest and possibly aliens.

C. THE NALESZKIEWICZ PLEA

6. On February 8, 1990, Naleszkiewicz pleaded guilty to two felony charges arising from a scheme in which Genesis clients were defrauded when Naleszkiewicz failed to file several hundred cellular applications at the Commission. Warner attached the Statement of Facts section to a consent decree that was entered with the guilty plea and

alleges that it confirms that the American "partnership formation was not independent of Genesis and/or Naleszkiewicz". Warner seems to be alleging that the Statement of Facts supports her earlier claim that Naleszkiewicz is the real party in interest behind the American application. However, she has not specifically indicated how the Statement of Facts relates to this proceeding.

IV. AMERICAN'S REPLY

7. American's Reply, filed February 28, 1990, opposes Warner's Petition and Supplement on procedural and substantive grounds and asks that they be dismissed or denied summarily.

A. AMERICAN'S PROCEDURAL OBJECTIONS

8. In a public notice issued on December 12, 1989 American was named tentative selectee and January 17, 1990 was set as the deadline for the filing of Petitions to Deny (Report No. CL-90-61). However, Section 1.823(b)(2) of the Commissions rules provides that Petitions to Deny may be filed against a cellular tentative selectee within 45 days of the public notice announcing tentative selectee status. On December 13, 1989 a public notice was issued establishing January 29, 1990 as the correct Petition to Deny filing date (Report No. CL-90-61-A).

9. Warner's Petition to Deny was filed on February 1, 1990 and American states that it should be dismissed as an unauthorized pleading. Warner's Supplement was not filed until February 20, 1990 and American seeks dismissal of it on the same ground. Also, American cites *Portland Cellular Partnership*, 2 FCC Rcd 5586, 5588 n.1 (Mob. Serv. Div. 1987), in support of its additional contention that the Supplement should be dismissed because the cellular rules provide for the filing of a Petition to Deny and a reply only. Accordingly, the Supplement is an unauthorized pleading.

10. American notes that Warner has not requested an extension time to file the Petition and Supplement, petitioned for acceptance of a late-filed pleading or requested waiver of the filing deadline. American states that Warner has not justified her inability to comply with the Commission's filing deadlines, especially with regard to the Supplement.

11. American also claims that Warner has not complied with Section 309(d) of the Communication Act and Section 22.30 of the Commission's Rules which require that Petitions to Deny contain specific allegations of fact supported by affidavits from persons with personal knowledge of the facts alleged. Affidavits are not required when official notice may be taken of the submitted information and American acknowledges that official notice may arguably be taken of some of Warner's material. However, American states that Warner has failed to identify which part of the information may appropriately be officially noticed and has failed to submit an affidavit for the remainder of the material. American specifically faults Warner for not supporting her antenna site allegations with anything other than her own "self-serving" affidavit and an unsigned draft affidavit from the landowner. American seeks dismissal of the Petition and Supplement for lack of supporting affidavits.

B. REAL PARTY IN INTEREST

12. American states that Genesis and Naleszkiewicz assisted in the formation of the partnership, prepared and filed its application, and provided it with consulting and engineering services. However, American denies that Genesis or Naleszkiewicz is the real party in interest behind its application. American claims that American is a general partnership controlled solely by its 23 partners and neither Genesis nor Naleszkiewicz is a partner. American states that the ownership, management and control of the applicant are established by its February 24, 1987 partnership agreement which it had filed with the Commission on October 27, 1989.

13. We will take official notice of the partnership agreement in our consideration of Warner's Petition. The partnership agreement includes a provision stating that $330,000 had been contributed to the partnership. The attached signature pages show partner contributions totaling approximately $260,000 and most of the contributions were made subsequent to the date the agreement was executed. It also appears, as alleged by Warner, that some partners received ownership interests that are out of proportion to their cash contributions. For example, several partners were awarded 5% interests for contributions of $16,500 whereas one (Mr. Thomas Fowler) was awarded 5% for $6,000. Mr. Timothy Baumann received a 5% interest for $12,500 as did Mr. Joseph Sorota.

14. The partnership agreement vests control over partnership business with a 2/3 majority vote of the partners and names Mr. Tony Ross as the managing partner. Mr. Ross is given signatory authority over the partnership's checking accounts and he may require the partners to make additional capital contributions as funds are needed. As managing partner, Mr. Ross is given responsibility for seeing to the day-to-day business affairs of American.

15. There is nothing in the partnership agreement regarding Genesis or Naleszkiewicz. However, Ross entered into a Services Agreement with Genesis on behalf of the partnership. The Services Agreement, like the partnership agreement, is dated February 24, 1987. It provides that Genesis will prepare and file applications in all 428 cellular Rural Service Areas (RSAs) for American for $329,000 which includes the filing fee of $200 per market. The money contributed by American's partners for their ownership interests was paid over to Genesis as its payment under the Services Agreement. Naleszkiewicz adjusted ownership percentages based on the amounts he received. In Ross' case the ownership interest was increased in recognition of his services as managing partner. The Services Agreement does not indicate that Genesis or Naleszkiewicz have any present, future or contingent ownership interest in American. The amount of payment due Genesis is not contingent upon American's success in the RSA lotteries.

16. In statements signed under penalty of perjury Ross and Naleszkiewicz deny that Genesis or Naleszkiewicz have any ownership interest in or control over American's application or that there are or ever have been any agreements which would give them an interest or control. American contends that Warner has failed to demonstrate that American is not the real party in interest of its application or that it has given up control of the application.

C. SITE AVAILABILITY

17. With regard to Warner's allegation that American did not have reasonable assurance that it would be able to utilize the property owned by James Martin for cell site 5 as proposed, American submitted a copy of a letter signed by Martin on January 18, 1988 addressed to Shaffer & Associates, Inc. In the letter Martin indicated that his land was available for use as a cellular radio antenna site and his willingness to discuss a lease with Shaffer & Associates or its designee. American also submitted a copy of a letter dated February 2, 1988 from Shaffer & Associates to Genesis which enclosed a copy of Martin's letter and gave Genesis permission to utilize Martin's letter as evidence of site availability in connection with applications filed by Genesis for its clients.

18. American contends that the documents mentioned above demonstrate that it had a reasonable assurance of the availability of the cell site when it filed its application in December 1988. The applicant claims that it has complied, in this regard, with the requirements of Section 22.15(a)(1) of the rules and that Warner's allegations to the contrary border on the frivolous.

D. FAILURE TO DISCLOSE OWNERSHIP

19. American concedes that its application failed to identify the owners of Applied Business Research, the general partnership owning 3% of the applicant. The applicant contends that this omission was due to a clerical error and is not decisionally significant given the modest size of the ownership interest involved. American named the two owners of Applied Business Research. They are both United States citizens who reside in Texas.

V. DISCUSSION

20. Warner's Petition, as supplemented, will be denied. It is procedurally defective and substantively without merit. Warner's Petition was three days late filed and was not accompanied by a request for late acceptance or wavier of the filing rules. The Supplement also was late filed (by three weeks) and Warner failed to explain why she could not have raised the issues discussed in the Supplement in a more timely manner. This is particularly true of the site availability issue. Warner has not indicated why she could not have investigated the availability of the challenged cell site in time to raise the issue in the initial Petition.

21. Nor has Warner complied with the affidavit requirements of the Section 309(d)(1) Communications Act or Section 22.30(a)(3) of the Commissions Rules. It is true that much of the material Warner relies on is from American's application file and may be officially noticed. Other material is not subject to official notice. Warner contends that American does not have reasonable assurance of one of its proposed cell sites but has not submitted the affidavit of the landowner. Instead she has submitted her own affidavit which fails to comply with the Communication Act's requirement that the affidavit be from a person with "personal knowledge thereof." Accordingly, Warner's site availability challenge is defective.

22. Even if Warner's Petition and Supplement were acceptable, we would deny it on the merits. Warner has totally failed to raise a question of fact regarding American's qualifications. We find no support for her assertion that Naleszkiewicz or Genesis is the real party in interest behind American's application. American's relationship with Naleszkiewicz and Genesis is defined by the partnership agreement and the Services Agreement. Genesis helped put the American partnership together, and prepared and filed the partnership's RSA applications, including the one for the Tennessee 3 RSA. That Naleszkiewicz allocated ownership percentages in American is not, by itself, indicative of control. The partnership agreement clearly places control over American with the partners and neither Naleszkiewicz nor Genesis own any part of American. That some American partners seem to have received more of an interest than others who made the same investment is not an indication that Naleszkiewicz or Genesis is the real party in interest behind the application.

23. Nor does the fact that Genesis provided post lottery services to American cause any concern. Genesis sought to perfect American's application by securing the necessary FAA clearances for American's proposed tower sites (*See* American's Technical Amendment filed February 26, 1990). There is nothing sinister about this. Genesis is obligated under the Services Agreement to provide American with a complete application and to do what is necessary to perfect that application. Certainly, securing the necessary FAA clearances for the sites specified in the application is consistent with Genesis's responsibilities under the Services Agreement and does not suggest undue control or an undisclosed ownership interest. Nothing in our rules prohibits an applicant from obtaining services from third parties in prosecuting its application as long as the applicant maintains control over the application. Warner has failed to raise any factual issues which suggest that the American partnership is not the real party in interest behind its application or that Genesis or Naleszkiewicz have an undisclosed ownership interest in American's application. *See Public Notice*, 1 FCC Rcd 3 (1986). In reaching this conclusion we have not relied on the affidavit of Naleszkiewicz submitted by American.

24. The site availability issue raised by Warner must also be rejected. First, the only support submitted by Warner on this issue is her own affidavit purporting to relate and interpret what the site owner, James Martin, had told her. This is an insufficient showing and based on hearsay. Apparently, Martin has declined to sign the draft affidavit Warner has prepared for him - and without his signature the draft affidavit cannot be given any weight. Finally, American has submitted documentation demonstrating that Martin has indicated, in writing, a willingness to allow a cellular antenna on his land and that Genesis clients were among those who could rely on that statement.

25. American's failure to disclose the identity of ownership of a general partnership which itself is a 3% partner in American is an inconsequential omission. There is no reason to reject American's claim that it was due to a clerical error. The now identified individuals are not aliens, as hypothesized by Warner, and in view of their limited ownership cannot reasonably be considered as undisclosed real parties in interest.

VI. WARNER'S APRIL 11, 1990 FILING

26. On April 11, 1990 Warner filed yet another collection of documents. The first exhibit is a letter from Warner advising the Commission that she has retained a lawyer. Next is a copy of a letter addressed to Warner and

dated March 28, 1990 from a lawyer, Fredrich H. Thomforde, Jr., of Knoxville, Tennessee. Mr. Thomforde's letter is in the nature of a legal opinion or expert analysis and he concludes that the offer and sale of the partnership interests in American constituted the offer and sale of a security that had not been registered. Mr. Thomforde also opines that further inquiry is necessary in order to determine whether American or Genesis is in control of the partnership.

27. Following Mr. Thomforde's letter is a one page, untitled, unsigned, unidentified typewritten document which seems to address several of the arguments submitted by American in its pleadings. Finally, there are two documents which appear to have originated with Federal Express and seem to indicate that Warner dropped off something at Federal Express in Crossville, Tennessee, on January 25, 1990 which was delivered to the Commission on January 26, 1990. Although this document is not self-explanatory, it may relate to the question of whether Warner's Petition was timely filed.

28. The April 11, 1990 filing is not authorized by the Commission's Rules, and is not presented in a format that warrants consideration. We have considered the earlier Warner filings on their merits although they suffer from the procedural defects described above. We will not, however, consider the merits of the latest Warner submission for several reasons. There is no provision in the rules for an additional pleading from a Petitioner and Warner has failed to explain why she should be permitted to supplement her earlier filings. Moreover, Warner has made no attempt to submit an acceptable pleading. Only the letter advising that she employed counsel is signed by her. The other documents are attached *seriatum* without explanation. The Commission should not be put in the position of having to make assumptions as to the significance or source of documents that are presented. Finally, the documents are not helpful. We do not need a lawyer's expert opinion on whether additional inquiry into Genesis' relationship with American is required or whether the ownership interests should have been sold as registered securities. Whether or not Naleszkiewicz violated security regulations does not impact on the character qualifications of the applicant. Finally, consideration of the Federal Express documents is unnecessary because we have concluded that Warner's Petition would have been denied on its merits even if it had not been dismissed. For all these reasons, we will not evaluate the merits of the documents attached to Warner's April 11, 1990 letter.

VII. CONCLUSION AND ORDERING PARAGRAPHS

29. Warner's Petition and Supplement are defective and are, hereby, dismissed. We have nevertheless, addressed the issues specifically raised by Warner and have found that they are without merit. Warner has also dropped hints about other defects in American's qualifications without specifically raising the issues. We find this method of pleading to be inappropriate and we further find the matters suggested to be totally unsupported. Specifically, nothing presented suggests that American's qualifications must be examined because Naleszkiewicz has pleaded guilty to a felony growing out of a filing scheme he conducted at Genesis but which has no demonstrated nexus to American's application. Although we have found Warner's Petition as supplemented to be procedurally defective, we would deny it if we were to address the merits of her arguments.

30. For the reasons set forth herein we find that American Cellular Services U.S. is legally, financially, technically, an otherwise qualified to hold the non-wireline cellular license for the Tennessee 3 (Macon) RSA and that grant of the application will serve the public interest.

31. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of American Cellular Services U.S., as amended, File No. 10763-CL-P-645-A-89 IS GRANTED.

32. This authorization does not include the right to any interference protection in any areas outside the Tennessee-3 Macon RSA and is also conditioned upon coordinating with current or future co-channel licensee(s) in the areas outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

33. IT IS FURTHER ORDERED that the Petition to Deny filed by Vivian Warner IS DENIED.

34. IT IS FURTHER ORDERED that all nonwireline cellular applications in the Tennessee - 3 Macon RSA American Cellular Services U.S. other than the application of Tennessee-3 Macon RSA American Cellular Services U.S. ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO. INC. File No. I-T-C-90-066

Application for authority to acquire and operate facilities for service between Puerto Rico and the Dominican Republic.

ORDER AND AUTHORIZATION

Adopted: May 16, 1990; Released: May 24, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on March 6, 1990 by AT&T of Puerto Rico, Inc. (AT&T-PR), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for service between Puerto Rico and the Dominican Republic. The application was placed on public notice on March 14, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-066 IS GRANTED, and AT&T-PR is authorized to:

a. lease from Telefonica Larga Distancia de Puerto Rico (TLD) and operate one-half interest in two 1.544 Mbps digital streams (equivalent to 48 56 Kbps circuits) in the Puerto Rico terminal of the Puerto Rico-Dominican Republic Digital Microwave System, including the extension facilities between TLD's Technical Maintenance Center and the Puerto Rico terminal at Monte de Estado;

b. lease from Puerto Rico Telephone Co. (PRTC) suitable extension facilities between TLD's Technical Maintenance Center and AT&T-PR's operating center in San Juan; and

c. use said facilities to provide AT&T-PR's regularly authorized services between Puerto Rico and the Dominican Republic and beyond.

3. The Commission's temporary authorization (TAO-1600), granted March 8, 1990, is hereby terminated.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECOM ACCESS, INC. File No. I-T-C-90-078

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 16, 1990; Released: May 25, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on March 20, 1990 by International Telecom Access, Inc. (ITA), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on Apri 4, 1990. No comments were received.

2. The applicant is a start-up company which proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. ITA has filed information required by Section 63.01 of the Commission's Rules. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ITA.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-078, IS GRANTED, and ITA is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN TELECOMMUNICATIONS, CORP. File No. I-T-C-90-082

Application for authority to acquire and operate facilities for private line service between the Northern Mariana Islands and Hong Kong.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 16, 1990; Released: May 25, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on March 22, 1990 by Micronesian Telecommunications Corp. (MTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for private line service between the Northern Mariana Islands (NMI) and Hong Kong. The application was placed on public notice on April 11, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of private line service between the NMI and Hong Kong by MTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-082 IS GRANTED, and MTC is authorized to:

a. lease from Comsat and operate one voice-grade satellite circuit between the Saipan earth station and an appropriate satellite over the Pacific Ocean, connecting with a similar circuit between the satellite and an earth station in Hong Kong, furnished by MTC's correspondent in Hong Kong; and

b. use said facilities to provide private line service between the NMI and Hong Kong and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Hong Kong, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-331

In the Matter of

Amendment of Section 73.202(b),	RM-5471
Table of Allotments,	RM-5614
FM Broadcast Stations.	
(Corinth, Hadley and Queensbury, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1990; Released: May 25, 1990

By the Commission: Commissioner Duggan concurring and issuing a separate statement.

1. The Commission has before it an Application for Review filed by Hastings Broadcasting Corporation,[1] licensee of Station WSCG, Corinth, New York, directed to the staff *Memorandum Opinion and Order*, 4 FCC Rcd 5709 (MM Bur. 1989), which denied an earlier petition for reconsideration of the *Report and Order* in this proceeding, 2 FCC Rcd 3316 (MM Bur. 1987). For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. At the request of Jedco Broadcasting Corporation ("Jedco"), former licensee of Station WSCG, the *Notice of Proposed Rule Making* in this proceeding, 51 Fed. Reg. 29576 (Aug. 19, 1986), proposed the substitution of Channel 289B1 for Channel 228A at Corinth, and modification of the Station WSCG license to specify operation on Channel 289B1. Bradmark Broadcasting Company ("Bradmark") filed a counterproposal proposing the allotment of Channel 289B1 to Queensbury, New York, as a first local FM service. In accordance with the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), the *Report and Order* concluded that a Channel 289B1 allotment to Queensbury should prevail over the proposed upgrade at Corinth. The *Report and Order* allotted Channel 289B1 to Queensbury with a 19.5-kilometer (12.1 miles) south site restriction to avoid a short-spacing to Station CFGL-FM, Channel 289C1, Laval, Quebec, Canada.[2]

3. Thereafter, Jedco filed a petition for reconsideration directed against the Channel 289B1 allotment at Queensbury. In that petition for reconsideration, Jedco stated that the 19.5-kilometer site restriction precludes the requisite 70 dBu principal city coverage of Queensbury in contravention of Section 73.315(a) of the Commission's Rules. In support of this argument, Jedco included an engineering exhibit indicating that only 75% of Queensbury would receive 70 dBu service. Also, in its "Request for Official Notice," Jedco referred to the six pending applications for the Queensbury allotment. All of the applicants had requested waiver of Section 73.315(a) of the Rules based on 70 dBu coverages of Queensbury ranging from 66 to 95%.

4. On July 7, 1989, the staff adopted the *Memorandum Opinion and Order* dismissing the petition for reconsideration. In that *Memorandum Opinion and Order*, the staff noted that on April 20, 1989, it received concurrence from the Canadian government with respect to a specially negotiated Channel 289B1 allotment at Queensbury. As a result of that concurrence, the reference coordinates for the Queensbury allotment are now the same as the city reference coordinates without the need for a site restriction. The six applicants for this allotment were permitted to amend their applications without loss of cut-off protection to specify a site that would enable them to comply with the 70 dBu principal city coverage requirement. In view of the action eliminating the need for a site restriction and permitting the applicants to amend their applications, the arguments advanced by Jedco were no longer valid and its petition for reconsideration was dismissed.

5. In support of its Application for Review, Hastings Broadcasting Corporation ("Hastings") asserts that the "extraordinary procedure" of specially negotiating the Canadian concurrence for the Channel 289B1 allotment at Queensbury had "run roughshod" over the "rights" of Station WSCG. Hastings also contends that the staff "ignored the reasonable solution" of allotting a Class A channel to Queensbury which would have permitted the Channel 289B1 upgrade at Corinth. Finally, Hastings argues that denying the proposed upgrade at Corinth ignores the public interest and the Commission policy of encouraging upgrades for Class A FM stations. We discuss, in turn, the arguments advanced by Hastings.

DISCUSSION

6. Specially negotiating a concurrence with the Canadian government pursuant to the Working Arrangement under the Canada-U.S.A. FM Broadcasting Agreement, see *Public Notice* released November 19, 1984 (mimeo 908), was not an "extraordinary procedure" to "legalize" a short-spaced allotment. Our Working Arrangement with Canada provides for a three level acceptance procedure. At the first level, the Commission applies the spacing requirements set forth in Section 73.207(b)(2) of the Rules with respect to Canadian and U.S. FM allotments and assignments. In the present case, in order to comply with the appropriate spacing requirement in Section 73.207(b)(2), the staff imposed the 19.5-kilometer site restriction. [3] Inasmuch as the site restriction enabled the Queensbury allotment to comply with Section 73.207(b)(2), two other available procedures that would have avoided the need to site restrict the channel were not used. Specifically, if a proposed U.S. allotment cannot meet the appropriate spacing requirements, the staff may then consider whether the interfering contour of the proposed U.S. allotment would overlap the service contour of the Canadian allotment. If there is no such overlap, the proposal meets the guidelines generally applied in negotiating short-spaced allotments. If there is such overlap, the staff then determines the area receiving interference. Depending on the location of that area, the short-spacing may be acceptable. The Working Arrangement specifically states that a Canadian allotment will not be protected on the U.S. side of the border. In the present situation,

Channel 289B1 at Queensbury, without a site restriction, would not cause interference to Station CFGL-FM.[4] In addition, the interfering contour of the Queensbury allotment, at the city reference coordinates, would not extend to the U.S.-Canadian border. For these reasons, once it was ascertained that the site restriction precluded principal city coverage, the staff properly availed itself of the option to specially negotiate, pursuant to the Working Arrangement, a Channel 289B1 allotment at Queensbury without the need for a site restriction. Because these procedures are specifically contemplated by the Working Arrangement, the staff actions were neither extraordinary nor unreasonable.[5] Moreover, the staff's use of those procedures on reconsideration did not prejudice the Corinth proponent because, had the difficulties with city grade coverage from the restricted site been raised during the initial comment period, it would have been proper for the staff to use those procedures to render the Queensbury allotment acceptable.

7. We recognize that allotting a Class A channel to Queensbury could have provided a first local service to Queensbury while also providing for the Channel 289B1 upgrade at Corinth. However, no party in this proceeding has expressed an interest in applying for a Class A allotment. We adhere to the policy of not allotting a channel to a community where there is no assurance that a party will file an application for the allotment. *Cf. Santa Isabel, Puerto Rico*, 51 Fed. Reg. 6119, published February 20, 1986; *See also, Bradford, Vermont*, 3 FCC Rcd 6964 (MM Bur. 1987). We continue to believe that allotting channels without such assurances could lead to allotments lying vacant and an attendant waste of spectrum. More importantly, even if we were to allot a Class A channel to Queensbury, we are still of the view that the Channel 289B1 allotment to Queensbury would provide a greater public interest benefit than a Channel 289B1 upgrade at Corinth. In this connection, the Class B1 upgrade at Corinth would have provided service to approximately 93,896 additional persons. On the other hand, the Class B1 allotment at Queensbury would, subtracting the population that would be served by a Class A station at Queensbury, provide service to approximately 113,502 persons.

8. The *Report and Order* allotting Channel 289B1 to Queensbury and denying the proposed upgrade at Corinth did not ignore the Commission policy of encouraging Class A station upgrades. *See, e.g., Modification of FM and Television Licenses*, 98 FCC 2d 916 (1984). The conflicting proposals in this proceeding were comparatively considered under the Commission guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In comparing conflicting rule making proposals, the priorities are as follows:

1) First full-time aural service

2) Second full-time aural service

3) First local service

4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3))

Inasmuch as the Channel 289B1 allotment to Queensbury represents a first local service under priority 3, it was favored over the expansion of an existing service, which would be considered under priority 4. We agree with the staff determination in this instance. It is also our view that a modification of license to a superior channel does not, in this case, provide as great a public interest benefit as that of a new primary service. *See Andalusia, Alabama*, 49 Fed. Reg. 32201 (Aug. 13, 1984). Because the proposed Station WSCG upgrade would be neither a first nor second full-time aural service, a new allotment at Queensbury would also be favored under priority 4 because it represents a new local service.

9. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Hastings Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Hastings Broadcasting Corporation is the successor to Jedco Broadcasting Corporation, former licensee of Station WSCG, Corinth, New York.

[2] While the Commission normally allots channels based on a set of geographic coordinates located within the principal city to be served, the Commission often allots "site restricted" channels. *See* 47 CFR § 73.208(a)(2). In such cases, if there appears to be a suitable area in which to locate a transmitting facility that would comply with the Commission's minimum spacing requirements and provide predicted principal city service [*See* 47 CFR §§ 73.207, 73.315], the Commission will make an allotment even if spacing constraints would prevent location of a transmitter at the city reference coordinates.

[3] At that distance, a Class B1 allotment would normally provide the requisite 70 dBu coverage of its community of license assuming uniform terrain.

[4] The distance between the Queensbury city reference coordinates and Station CFGL-FM is 236.5 kilometers. The 34 dBu interfering contour of a Class B1 Queensbury allotment, using the F(50,10) curves, would extend 146 kilometers. The 54 dBu service contour of Station CFGL-FM, using the F(50,50) curves, would extend 86 kilometers. The sum of these two distances is less than 236.5 kilometers.

[5] *See* Sections 5.1.2 and 5.1.2.4 of the Working Arrangement.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

Re: Application for Review filed by Hastings Broadcasting Corporation

While I join my fellow Commissioners in approving this item, I must sound a note of concern.

Hastings Broadcasting Corporation, in support of its application for review, has charged that the FCC's Mass Media Bureau resorted to an "extraordinary procedure" which "[ran] roughshod" over its rights -- specifically, the Bureau's decision to negotiate a special concurrence with the Canadian government for the Channel 289B1 allotment at Queensbury, New York.

The Bureau has pointed out that it had the legal right to pursue the course it chose, and I must accept that fact. I am concerned, nevertheless, that although the Bureau had a right to act as it did, it may have acted with insufficient regard for the sensibilities of the applicant. It also strikes me that the Bureau, having erred in imposing a site restriction that actually precluded principal city coverage, showed no inclination to ackowledge that error.

In the end, my fellow Commissioners have been persuaded that providing a first local service in Queensbury is more in the public interest than upgrading an existing service in Corinth. I join them in this decision. But I do so with some sympathy for those who feel abused by the long and torturous process that has led to this outcome.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Illinois Consolidated Telephone Co. — Transmittal Nos. 38, 55

Petition for Waiver of Part 69
Regarding Operator Transfer

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1990; Released: May 14, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On October 25, 1989, Illinois Consolidated Telephone Company (ICTC) sought a waiver of Part 69 of the Commission's Rules,[1] 47 C.F.R. Part 69, to the extent required to provide transfers of O- interLATA calls from its operators to its default interexchange carrier (IC) customer, the American Telephone and Telegraph Company (AT&T).[2] Specifically, ICTC sought to establish a new rate element for the provision of "Operator Transfer Service" and the reallocation from the Interexchange category to the Local Transport rate element of costs associated with the provision of such service to IC access customers on a per call basis. A waiver of the rules is required to provide ICTC's Operator Transfer Service because the Commission's rules do not contain a rate element for the provision of such a service, and because Sections 69.306(b) and 69.404 of the rules, 47 C.F.R. §§ 69.306(b), 69.404, require that costs associated with operator transfer service be allocated to the Interexchange category.

2. On May 11, 1990, ICTC filed Transmittal No. 55 to amend its request that the associated costs of operator transfer service be allocated to the Local Transport category; these costs would instead continue to be allocated to the Interexchange category under ICTC's revised filing, pursuant to the Commission's rules. [3]

3. ICTC is an independent telephone company which has not yet fully converted to equal access. In its petition, ICTC indicates that prior to November 1, 1989, interLATA operator transfer services to AT&T had been provided by ICTC under contract. ICTC Petition at 3. As a result of the expiration of that contract, ICTC provides these transfers to AT&T at no charge because its customers are accustomed to dialing O- for interLATA assistance. ICTC Reply at 7. Transmittal No. 38 would implement a rate element to recover the costs of providing these transfers to AT&T. In addition to normal switched access minutes of use charges, AT&T will be assessed a flat fee of $.35 for every 0- call that is transferred by ICTC. *See* ICTC Tr. No. 38, Description and Justification (D&J) at 3.

4. ICTC plans to offer O- transfer services to other access customers by late 1990 or early 1991, at which time it expects to have completed its equal access conversion. ICTC Petition at 2 n.4. ICTC indicates that it will make an additional filing prior to offering this transfer service to multiple carriers. *See* ICTC Reply at 6.

II. PLEADINGS

A. Petitions

5. Four parties responded to our Public Notice soliciting comments on the ICTC petition and transmittal,[4] and three replied to those comments.[5] Parties opposed to ICTC's waiver petition argue against allowing an operator of a local exchange carrier to transfer interLATA calls to an IC operator. *See* ITI Opposition at 9. These parties argue that O-transfer services, in general, contravene presubscription of O+ traffic by enabling callers to circumvent the presubscribed choice of the premises owner by dialing O- to reach an operator who then transfers the caller to another IC. *See Id.* at 4; OSPA Comments at 2; CNS Comments at 4; Metromedia Comments at 2.

6. Opponents of the petition argue that it raises many broad public interest issues that should be addressed in a Rule Making before the Commission grants this waiver request. *See* ITI Opposition at 10-13; CNS Comments at 3. ITI and CNS express concern about the future application of this service to other ICs and the lack of uniformity in the handling procedures for these calls. *See* ITI Opposition at 6; CNS Comments at 3-4. OSPA contends that ICTC's plan will reduce network efficiency by encouraging O- over O+ calling. According to OSPA, efficiency will be decreased because the customer will have to deal with two operators, and consumer costs will rise as ICs pass on these transfer costs to their end users. OSPA Comments at 6-7. *See also* ITI Opposition at 5. ITI contends that the extension of ICTC's plan to include multiple carriers will promote AT&T's monopoly because the smaller ICs will not be able to afford subscribing to the transfer service. *Id.* at 3, 8. ITI argues that a Rule Making is essential because the availablility of O-transfers jeopardizes presubscription and unfairly complicates business planning of interexchange carriers. *Id.* at 6-7.

B. Replies

7. Proponents of the petition contend that O- transfer services are in the public interest and already operate in the Bell Atlantic and NYNEX regions. *See* Southwestern Reply at 7; USTA Reply at 3.[6] USTA asserts that requirements for uniform standards will penalize customers by slowing the movement to equal access by independent telephone companies. USTA Reply at 2. Southwestern notes that ICTC's offering is a transitional one, offered only to AT&T at this time and, therefore, concerns regarding the operation of that service for multiple carriers are premature. Southwestern Reply at 8. Southwestern asserts that ICTC, as an independent telephone company, is not subject to the equal access requirements established by the Court in the Bell System divestiture proceeding, and that concerns regarding presubsciption are inappropriate. *Id.* at 3.

8. In ICTC's view, the scope of its petition is limited to providing a narrow service and receiving compensation for it. ICTC Reply at 3-4. ICTC argues that its interim waiver request is intended to solve a temporary problem and does not require a Rule Making. *Id.* at 9-10. Its

operator transfer service serves the needs of consumers and does not contribute to network inefficiency because the network's purpose is to serve the consumer. *Id.* at 4. ICTC emphasizes that it is currently providing this service at no charge and therefore believes that a grant of its petition is appropriate. *Id.* at 10. ICTC explains that before offering its service to multiple carriers, it will follow any existing rules regarding O-transfer services as well as file another tariff. *Id.* at 3, 6.

III. DISCUSSION

9. The Bureau believes that good cause exists to grant this waiver. Strict compliance with the rules in this instance would be inconsistent with the public interest for the following reasons.[7] First, ICTC's proposal, at this juncture, is to establish a rate element for a service that it currently provides to AT&T at no charge since expiration of the contract. Thus, ICTC is merely attempting to recover from AT&T costs AT&T causes in receiving O- transfer services – a goal which is consistent with Commission policy. Second, the Bureau has previously concluded that O- transfer services, offered in the Bell Atlantic and NYNEX regions, were in the public interest. *See* n.6 *supra*. We agree with ICTC that, given the narrow scope of its waiver request and its interim nature, a Rule Making proceeding is not necessary. Nor is it necessary that we address at this time the broad issues raised by the commenters regarding the provision of O- transfer service by local exchange carriers.

10. Accordingly, we grant ICTC's request for waiver of Part 69 to the extent necessary to establish a separate rate element for the provision of Operator Transfer Service. We emphasize, however, that the Bureau's grant of ICTC's waiver petition is for service to AT&T only. The Bureau expects ICTC, as represented in its pleadings, to seek a further waiver and to file a new transmittal prior to offering transfer services to multiple carriers.

IV. CONCLUSION

11. Accordingly, IT IS ORDERED that the petition for waiver filed by Illinois Consolidated Telephone Company IS GRANTED, to the extent provided herein.

12. IT IS FURTHER ORDERED that the petition filed against Transmittal No. 38 by International Telecharge Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Specifically, ICTC sought a waiver of Sections 69.4(b), 69.111, 69.306(b), 69.307, 69.401(b), 69.404, and 69.409 of the Commission's Rules, 47 C.F.R. §§ 69.4(b), 69.111, 69.306(b), 69.307, 69.401(b), 69.404, 69.409. *See* Illinois Consolidated Telephone Company Petition for Waiver, filed Oct. 25, 1989 (ICTC Petition); *See also* ICTC Transmittal No. 38, filed Oct. 25, 1989, and ICTC Transmittal No. 55, filed May 11, 1990.

[2] A "O-" call is a call made by an end user who merely dials O and not O plus ("O+") a telephone number. When an end user reaches an ICTC operator by dialing O- and requests a long distance operator, the ICTC operator transfers the call to AT&T.

[3] In Transmittal No. 55, ICTC states that it will continue to allocate the associated cost of the service to the Interexchange category in accordance with the Commission's rules and is moving the rate element from the Local Transport section of the tariff to a separate section containing only the Operator Transfer Service rate element. International Telecharge, Inc. (ITI) had protested ICTC's initial allocation request, arguing that allocation of operator transfer costs to the Local Transport component would be a substantial departure from the rules necessitating a Rule Making. In view of ICTC's amended waiver request, we need not address its initial request or ITI's objection to it.

[4] Public Notice, Illinois Consolidated Files Petition For Waiver Regarding Access Service Offering, 4 FCC Rcd 8221 (1989).

[5] On November 27, 1989, comments against ICTC's waiver petition were filed by the Operator Service Providers of America (OSPA Comments) and Capital Network System, Inc. (CNS Comments). International Telecharge, Inc. filed a petition to reject, or in the alternative, suspend and investigate ICTC's filing (ITI Opposition). Replies to these comments were filed by ICTC (ICTC Reply), Southwestern Bell Telephone Company (Southwestern Reply) and the United States Telephone Association (USTA Reply) on December 4, 1989.

Metromedia - ITT Long Distance, on November 27, 1989, incorporated by reference its comments submitted against Southwestern Bell's Operator Call Processing waiver petition and Transmittal No. 1874 (Metromedia Comments). ICTC argues that Metromedia's Comments should not be considered because Metromedia did not serve the Commission's commercial contractor as required by the Commission's Rules. ICTC Reply at 2 n.1. We have decided to include Metromedia's comments this time but remind Metromedia that, in the future, such service is required.

[6] Bell Atlantic and NYNEX, pursuant to similar waivers, offer O- transfer services in which any interexchange carrier can receive transfers of O- interexchange calls upon subscribing to their respective services. *See* New York Telephone Company, New England Telephone Company, Order, 63 Rad. Reg. 2d 1087 (1987); New York Telephone Company Revisions to Tariff F.C.C. No. 41 and New England Telephone Company Revisions to Tariff F.C.C. 40, Transmittal Nos. 919, 960, 934, Memorandum Opinion and Order, released Jan. 31, 1989; Bell Atlantic Telephone Companies Revision to Tariff F.C.C. No. 1, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Transmittal No. 262, Memorandum Opinion and Order, released Dec. 23, 1988.

[7] Rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F. 2d, 1153, 1159 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers'
Revisions to Tariffs To Implement
Section 36.154(a) of the
Commission's Rules

ORDER

Adopted: May 14, 1990; Released: May 14, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On December 14, 1989, the local exchange companies (LECs) filed tariff revisions regarding the separations treatment of mixed use special access lines to comply with the Commission's Decision and Order in CC Docket Nos. 78-72 and 80-286, 4 FCC Rcd 5660 (1989) (*Final Decision)* adopting the Joint Board Recommended Decision and Order, 4 FCC Rcd 1352 (1989) (*Recommended Decision).* [1] The scheduled effective date for these transmittals is May 15, 1990.

2. Allnet Communication Services, Inc. (Allnet) and Ad Hoc Telecommunications Users Committee (Ad Hoc) filed petitions seeking rejection and Aeronautical Radio, Inc. (ARINC) filed a petition for rejection or suspension and investigation. U S West Communications, Inc. (U S West), New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), the Bell Atlantic Telephone Companies (Bell Atlantic), Pacific Bell and Nevada Bell (Pacific), the Ameritech Operating Companies (Ameritech), Southwestern Bell Telephone Company (SWB), South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), Southern New England Telephone Company (SNET), and Cincinnati Bell Telephone Company (CBT) replied.

II. PLEADINGS

A. Certification of Usage

3. In its petition, Allnet objects to Ameritech's certification procedures requiring the customer to specify that the percentage of interstate usage (PIU) is 100 percent if the circuit is interstate. Allnet also complains that language requiring certification that the percentage interstate usage is over 10 percent is misleading because the Commission did not require the calculation of actual PIUs, nor must the percentage be 100. Allnet Petition at 5.

4. Ameritech replies that its practice of requiring customers to certify that lines are 100 percent interstate or 100 percent intrastate is simple to administer and that it has used this practice for several years. Ameritech Reply at 8. US West states that it requires interexchange carriers (ICs) to determine PIUs and certify any changes; end user customers certify whether interstate usage exceeds 10 percent. US West Reply at 11-12 n.27. Neither of these US West practices is included in its tariff. NYNEX requires a notation on the access service request (ASR) that interstate usage is 0 or 100 percent. NYNEX claims that the customer will base this notation on whether interstate use is greater than 10 percent. NYNEX Reply at 3.

B. New Order Certification

5. Ad Hoc opposes requirements for separate formal certifications for new orders, arguing that the access order for service from an interstate tariff should serve as the certification. Ad Hoc Petition at 11-12. SWB replies that it requires customers to fulfill the "verification" requirement for new orders by simply ordering the service from the interstate tariff. SWB Reply at 5.

C. Examples of System Configurations

6. ARINC objects to tariffs that describe certain system configurations and indicate the jurisdictional nature of various links in those systems. ARINC supports maximum user discretion instead. ARINC Petition at 7. U S West replies that it is not attempting to tariff or mandate particular system designs, but merely to display several clear-cut examples. U S West Reply at 5. NYNEX defends its examples of intrastate and interstate usage in a mixed use multipoint service as only stating that physically interstate legs are clearly subject to the interstate jurisdiction. It explains that the jurisdiction of remaining physically intrastate legs is to be determined by the mixed use rule. NYNEX Reply at 4.

D. Fixed Term Contracts

7. The U S West tariff provides that when a customer has an agreement for fixed term special access service from an intrastate tariff, and the jurisdictional nature of the line changes, the intrastate agreement will be converted to an interstate payment plan with a term equal to or greater than the intrastate term. U S West Tariff F.C.C. No. 1, § 2.3.11 (B). Ad Hoc says US West's fixed term service arrangement requirements are inappropriate. Ad Hoc Petition at 12-13. U S West defends its practice as "eminently fair," even though some customers may be required to convert to interstate service agreements with terms longer than the original intrastate term. U S West Reply at 6-8.

E. Frequency of Verification and Period of Record Retention

8. All of the tariffs address verification, *i.e.*, the carrier's ability to verify the jurisdictional certification of the customer by requiring the information upon which the customer relied. Most of the tariffs allow verifications in situations of billing disputes, and any time a regulatory commission questions the projected interstate percentage. ARINC opposes the use of "billing disputes" as an occasion for requiring verification, arguing that carriers should not be permitted to use the threat of jurisdictional reevaluation as leverage in resolving billing disputes. ARINC maintains that verifications should occur only if the customer representation appears genuinely questionable. ARINC Petition at 8. Virtually none of the tariffs limits the frequency of verification audits. Allnet and Ad Hoc both maintain that verifications should occur only at limited intervals such as once per year. Allnet Petition at 4; Ad Hoc Petition at 9. Finally, ARINC objects to the

tariffs' failure to state a limit on the length of time for which customers must retain the information and records upon which they base their certifications. ARINC Petition at 6.

9. Ameritech and Bell Atlantic reply that billing disputes over the nature of the jurisdiction of private lines will be the only type of billing dispute that will cause a jurisdictional verification. Ameritech Reply at 5; Bell Atlantic Reply at 3 n.9. Similarly, SNET states that its tariff allows verification only in cases of billing disputes or regulatory commission questions. SNET Reply at 4. Ameritech opposes any additional limitation on the frequency of customer information requests. Ameritech argues that it may have to ask for verification information more than once per year if required to do so by the Commission or state commissions at separate times, for example. Ameritech Reply at 5. Also, Ameritech claims that customers may reconfigure their networks several times per year, and this may raise disputes each time. *Id.* at 6.

10. BellSouth says it is inappropriate to limit verifications to once per year. According to Bell South, the complaint process can protect customers against unnecessary verifications, but the carrier must be free to investigate erroneous reporting. BellSouth Reply at 6. U S West states that it may perform verification audits on an annual basis, and requires systems record retention for one year. U S West Reply at 12. NYNEX says it is willing to limit verification requests to once per year, but customers should keep system design and function records as long as normal business practices require. According to NYNEX, it can reasonably be expected that a customer will keep records on its systems as long as the systems exist. NYNEX Reply at 7-8.

F. Nonrecurring Charges (NRCs)

11. ARINC and Ad Hoc argue that the Commission should require a permanent waiver of all interstate and intrastate NRCs for new circuit orders required by changes in the jurisdictional status of existing services. They argue that no new facility is required, and the end user has already paid installation charges for these circuits. They also claim that the customer should not be penalized because of an artificial reclassification scheme. ARINC Petition at 4-5; Ad Hoc Petition at 12.

12. In its reply, Ameritech opposes a waiver of NRCs, arguing that legitimate billing and administrative costs are incurred and should be borne by the cost causing customer. Also, Ameritech states that changes subsequent to initial implementation of the new rule are due to changes in the customer's business, and the LECs should not be responsible for those charges because they properly belong to the customer. Ameritech Reply at 3-4. Pacific states that it does not impose installation charges for new orders occasioned by jurisdictional changes to existing services. Pacific Reply at 8. SWB agrees to change its transmittal to provide that NRCs simply do not apply to changes in jurisdiction. SWB Reply at 4. Finally, U S West, BellSouth, and NYNEX claim that they do not charge NRCs for the switch from intrastate to interstate tariffs, but may charge for switches from interstate to intrastate jurisdictions if required or allowed by state law. They contend that the Commission has no jurisdiction over the waiver of intrastate nonrecurring charges. U S West Reply at 5; BellSouth Reply at 6-7; NYNEX Reply at 5.

G. Verification of Actual PIU and Requirements Additional Traffic Studies

13. All of the major LECs require customers to provide records of system design and function if the carrier audits the customer's certification. None specifically requires traffic studies to be performed solely for the purpose of audit, but many require traffic studies to be produced if they were used in the customer's initial jurisdictional determination. *See, e.g.*, Nevada Bell Tariff F.C.C. No. 1 § 2.3.16(C); Cincinnati Bell Telephone Company Tariff F.C.C. No. 35 § 2.3.16(C). Ad Hoc and ARINC argue that the information provided to carriers generally should be limited to documents displaying system design and function. Ad Hoc Petition at 13; ARINC Petition at 8. Allnet maintains that many of the verification provisions seem to imply the requirement for additional traffic studies and Ad Hoc objects to the verification requirements of BellSouth, for example, because it argues that BellSouth requires the maintenance and disclosure of highly detailed system usage data. Allnet Petition at 3; Ad Hoc Petition at 13. Many of the tariffs require the customer to provide the data the customer uses to determine the "projected interstate percentage" or "certified interstate percentage." Allnet argues that the verification language included in these transmittals contemplates the verification of an actual percentage of interstate and intrastate usage, instead of a verification of the certification that the access line does or does not have 10 percent or more interstate usage. Allnet Petition at 3-4.

14. U S West replies that if disputes arise, such as those related to billing, underlying information that is germane to the issue will be sought. What types of data will be required will be decided on a case-by-case basis. U S West Reply at 13. SWB does not require disclosure of any specific usage information. According to SWB, if a jurisdictional billing dispute arises, the SWB customer would supply general information about system design and function that the customer used to determine jurisdiction. SWB Reply at 6. Bell Atlantic similarly requires information solely on relative state and interstate traffic volumes based on system design and functions. Bell Atlantic Reply at 4. Pacific, Ameritech, BellSouth, and SNET require usage data if the customer has such data and has actually used the data to verify interstate traffic. Pacific Reply at 3, 5; Ameritech Reply at 6-7; BellSouth Reply at 4; SNET Reply at 3-4. Pacific, Ameritech, and SNET state specifically that they do not require customers to perform additional traffic studies. Pacific Reply at 9; Ameritech Reply at 6-7; SNET Reply at 3. BellSouth, U S West, and Bell Atlantic specifically state that no actual PIU is required. BellSouth Reply at 5; U S West Reply at 12 n.28; Bell Atlantic Reply at 4.

H. Other Issues

15. Ad Hoc contends that customer records regarding verification information should not be required to be turned over to the carrier, but should be made available at the customer location. Ad Hoc Petition at 14. In its reply, Ameritech argues for flexibility in the method of production of verification information: whether at the LEC premises or at the customer premises. Ameritech Reply at 7.

16. Ad Hoc and ARINC object to procedures involving periodic or quarterly reports as unnecessarily burdensome and inherently unreasonable. ARINC believes that after the initial jurisdictional analysis predicated on system de-

sign and function, users should only be required to reevaluate the jurisdictional nature of their systems if material changes occur in system design or traffic load patterns. Ad Hoc Petition at 14; ARINC Petition at 7. NYNEX replies that it does not require customers to recertify quarterly. NYNEX requires recertification only if the customer wishes to change jurisdictional status. NYNEX Reply at 6.

17. Ad Hoc objects to verification requirements for the maintenance and disclosure of data that is highly proprietary. Ad Hoc Petition at 13. Pacific and BellSouth reply that the types of information that customers would rely on to determine relative traffic volumes should not raise proprietary concerns. They argue that similar records for switched access traffic have been required generally, and that carriers are required by state law to safeguard any such information they receive. Pacific Reply at 2-4; BellSouth Reply at 4 n.6.

18. The tariff transmittals are not identical with regard to certification and verification procedures. Ad Hoc proposes uniform certification and verification language for the Commission to prescribe, arguing that uniformity is essential to avoid administrative complexity and customer confusion. Ad Hoc Petition at 7-10. All the carriers replying to this issue oppose uniform certification and verification language. *See, e.g.*, U S West Reply at 9; Pacific Reply at 5-8. Many argue that uniformity is not required by the *Final Order*. Thus, they contend that lack of uniformity does not render the tariffs unlawful, and there is no basis for prescription. *See, e.g.*, U S West Reply at 9-10; Pacific Reply at 6. Pacific states that because tariffs are carrier initiated, and carriers are not identical, their tariffs would not logically be identical. Pacific Reply at 7. BellSouth states that this proceeding should not be treated differently than any other, in which different carriers have carried out specific Commission directives with different language. BellSouth Reply at 5 n.8.

III. SUBSEQUENT FILINGS AND CONCLUSION

19. The LECs have modified their verification and certification procedures which were the subject of petitioners' protests. *See* Attachment B. In particular, they have clarified that existing customers should certify the jurisdiction of their current special access lines. In addition, the LECs have removed any examples of the types of special access lines or system configurations that would be classified as interstate. They have also modified their tariffs to allow a reasonable period of time after the effective date of the tariff revisions for any existing fixed term customer to change the jurisdiction of its service without incurring termination liability.

20. The Common Carrier Bureau has reviewed the tariff transmittals and the pleadings filed by the above-listed petitioners and carriers. In light of the revisions filed to address petitioners' concerns, we find that no compelling argument has been presented that the tariffs, as revised, are patently unlawful so as to require rejection and that an investigation of the revisions is not warranted at this time.

21. IT IS THEREFORE ORDERED that the petitions filed by Allnet Communication Services, Inc., Ad Hoc Telecommunications Users Committee, and Aeronautical Radio, Inc. against the above-listed tariff transmittals ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The various transmittals are listed in Attachment A.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 14, 1990

COMMON CARRIER BUREAU
REQUEST FOR DECLARATORY RULING

Mobile Telecommunication Technologies Corporation (MTel) has requested a declaratory ruling that its nationwide and multistate wide area paging service proposed on frequency 931.4375 MHz, to augment nationwide simulcast service on frequency 931.9375 MHz, is jurisdictionally interstate in nature and, therefore, subject solely to regulation by the Federal Communications Commission. MTel states that service on 931.4375 MHz would be integrated with the 931.9375 MHz network frequency, in part, to accommodate growth of its nationwide paging service.

Interested parties may file comments on the above described request for declaratory ruling (File No. MSD-90-12) no later than June 4, 1990. Replies may be filed by June 18, 1990.

A copy of MTel's request for declaratory ruling is available for inspection in the Mobile Services Division (Common Carrier Bureau) Public Reference Room 628, located at 1919 M Street, N.W. Washington, D.C.

Copies of this document may be obtained from:

International Transcription Service
2100 M Street, N.W.
First Floor
Washington, D.C. 20036

Phone: (202) 857-3800

For further information, contact Leila Brown at (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy Regarding Character Qualifications in Broadcast Licensing

Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications

POLICY STATEMENT AND ORDER

Adopted: May 10, 1990; Released: May 11, 1990

By the Commission:

1. The Commission herein announces certain modifications to its policies regarding character qualifications previously enunciated in *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (hereinafter referred to as *Character Policy Statement*). We are also amending our rules to make the provisions of 47 C.F.R. § 73.1015 regarding misrepresentation applicable to all applications and/or statements filed with the Commission, and we are adding a new section 1.65(c) requiring broadcast licensees to report adjudications relevant to character qualifications that are issued during the license term.

2. After several years of experience with, and further consideration of, the policies enunciated in the *Character Policy Statement*, we have determined that certain adjustments are in order. In our view, the *Character Policy Statement* took an overly narrow view of the range of misconduct that should be relevant in licensing decisions covered by it. Like the policies enunciated in the *Character Policy Statement*, the modifications announced herein are statements of policy that will guide our future decisions. *See American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). Accordingly, while we intend to continue to be guided by the policies set forth in the *Character Policy Statement*, as modified herein, we remain "free to exercise . . . discretion in situations that arise." *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Co.*, 589 F.2d 658, 666 (D.C. Cir. 1978).[1]

A. Range of Relevant Non-FCC Misconduct

3. In the *Character Policy Statement*, we indicated that the Commission would concern itself with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. We therein generally indicated that the Commission would consider only adjudicated (a) fraudulent representations to governmental units, (b) criminal misconduct involving false statements or dishonesty, and (c) broadcast-related violations of antitrust or other laws dealing with competition. 102 FCC 2d at 1195-1197, 1200-1203. However, upon further reflection, we believe a propensity to comply with the law generally is relevant to the Commission's public interest analysis, and that an applicant's or licensee's willingness to violate other laws, and, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies.

4. Thus, evidence of any conviction for misconduct constituting a felony[2] will be relevant to our evaluation of an applicant's or licensee's character.[3] Because all felonies are serious crimes, any conviction provides an indication of an applicant's or licensee's propensity to obey the law. We also recognize that not all convictions for serious crimes are equally probative, but, in the context of this *Policy Statement*, it is not necessary or appropriate to establish a "hierarchy" of felonies that may arise in individual cases.

5. While conviction for a felony raises questions of whether an applicant or licensee has the requisite propensity to obey the law, we continue to believe that there are mitigating factors that must be taken into consideration in our deliberations. We will continue to look at the kinds of factors set forth in the *Character Policy Statement* in making determinations in particular cases, *e.g.*, the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation.[4] *See* 102 FCC 2d at 1227-29.

6. The *Character Policy Statement* stated that "broadcast related" violations of the antitrust laws were specifically relevant. Because of the interrelationship of the mass media, we see no reason to limit our focus to broadcast related violations. We therefore believe that adjudicated violations of antitrust or anticompetitive laws involving any media of mass communications, as defined in 47 U.S.C. § 309(i), also are relevant to our licensing decisions. However, as with felony convictions, the same factors of mitigation will apply, and applicants and licensees will be permitted to demonstrate that the misconduct should not result in disqualification.

B. Pending Proceedings Relating to Non-FCC Misconduct

7. We continue to believe that it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated by another agency or court. *Character Policy Statement*, 102 FCC 2d at 1204-05.[5] We indicated in the *Character Policy Statement* that we retain discretion to condition grants on the outcome of proceedings involving non-FCC misconduct.

Id. at 1206 n.66. We now wish to emphasize that where such matters remain pending in another forum we may, in appropriate cases, condition any grant of the application before us on the outcome of that proceeding.[6] That is, we will consider conditioning the grant in any case in which a matter being litigated in another forum could result in an adjudication that an applicant before the FCC has engaged in relevant non-FCC related misconduct and an adjudication of that misconduct raises serious questions as to whether the applicant before the FCC is possessed of the requisite propensity to obey the law. Where we have determined that a condition is appropriate, we will generally await the decision by the ultimate trier of fact before taking any additional action. If that decision is adverse to the applicant, we will revisit the conditioned grant to determine whether we would have made that grant if the adjudicated misconduct had been before us. We will consider the appropriateness of adding a condition in connection with all types of broadcast applications, *e.g.*, applications for new licenses and the renewal of existing licenses.[7]

C. Impact on Existing Licensees

8. Generally, we do not intend to change our policies regarding the case-by-case determination of whether an existing licensee, designated for hearing on character issues with respect to one license, may buy or sell other licenses or have other authorizations renewed. *See Character Policy Statement*, 102 FCC 2d at 1223-25; *Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983). We wish to make clear, however, that, in appropriate cases, the Commission may condition the grant of any application involving a licensee that has been designated for hearing on character issues. If the decision in the hearing is adverse to the licensee, we will revisit any such conditioned grants to determine whether we would have made the grant if the adverse hearing determination had been before us.

D. Form Changes

9. In order to consider the application of these policies in individual cases, a number of FCC forms, and/or the instructions thereto, will need to be amended to include appropriate questions concerning adjudicated or pending adjudications of relevant misconduct by the applicant. Such form modifications will broaden the class of relevant misconduct to include all felonies and mass media related antitrust or anticompetitive matters. In addition, renewal applicants, as well as assignors and transferors, will be required to provide information regarding relevant pending adjudications involving fraudulent representations to governmental units, felonies, and mass media related antitrust or anticompetitive matters.[8] We will delegate to the Managing Director, in consultation with the Chief, Mass Media Bureau, the authority to make such form changes.

E. Rule Changes

10. In the *Character Policy Statement*, we adopted a rule prohibiting any applicant, licensee, or permittee from making any written "misrepresentation or willful material omission[s] bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. § 73.1015. On its face, that rule is not limited to broadcast applicants, licensees, and permittees. Nevertheless, because it was placed in Part 73 of our rules, it is technically not applicable to other applicants, licensees, and permittees. However, all Commission licensees are already required to tell the truth to the Commission. *See* 47 U.S.C. § 312(a)(1).[9] We believe that it is appropriate for the Commission to restate the clear intent of section 312(a)(1) as a rule generally applicable to all applicants, licensees, and permittees for all radio facilities. Accordingly, we will amend Part 1 of our rules by addition of a new section 1.17 that is substantially the same as section 73.1015, except that, by virtue of its location in Part 1, it will be applicable to applicants, licensees, and permittees in all radio services.

11. As applicants are required to provide information on pending adjudications of relevant misconduct, any material change in the status of such pending adjudications (*e.g.*, convictions or dismissals) must be reported to the Commission pursuant to section 1.65 of our rules. 47 C.F.R. § 1.65(a). In this regard, we are also adding a new section 1.65(c) to require broadcast permittees and licensees to report adjudications relevant to character qualifications that are issued during the license term.[10]

CONCLUSION

12. Accordingly, IT IS ORDERED that the Commission's rules are amended by the addition of a new section 1.17 and a new section 1.65(c) as set forth in the Appendix hereto. The new section 1.17 SHALL BE EFFECTIVE 30 days from publication of a summary of this Policy Statement and Order in the Federal Register. The new section 1.65(c) is subject to approval by the Office of Management and Budget under the Paperwork Reduction Act and SHALL BE EFFECTIVE 90 days from publication of a summary of this *Policy Statement and Order* in the Federal Register.

13. IT IS FURTHER ORDERED that the Managing Director, in consultation with the Chief, Mass Media Bureau, is delegated authority to amend all applicable FCC forms, in accordance with the provisions of this *Policy Statement and Order*, subject to the approval of the Office of Management and Budget under the Paperwork Reduction Act.

14. The action herein is taken pursuant to section 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act of 1934, as amended.

For further information regarding this proceeding, contact Martin Blumenthal, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

LIST OF CFR SUBJECTS AFFECTED:

47 CFR 1 Administrative Practice and Procedure

Radio

APPENDIX

Part 1 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for Part 1 continues to read: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303; Implement, 5 U.S.C. § 552, unless otherwise noted.

2. Section 1.17 is added to 47 C.F.R. Part 1, to read as follows:

1. 17 Truthful written statements and responses to Commission inquiries and correspondence.

The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

NOTE: Section 1.17 is limited in application to written matter. It implies no change in the Commission's existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions.

3. Section 1.65 is amended by adding a new subsection (c) to read as follows:

* * * * *

(c) All broadcast permittees and licensees must report to the Commission any adverse finding or adverse final action taken by any court or administrative body, within 30 days of the issuance of any such adverse finding or adverse final action, that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form.

FOOTNOTES

[1] Notice and comment procedures are not required for the issuance of policy statements. *See* 5 U.S.C. § 553(b)(A). While we chose to use such procedures in the *Character Policy Statement*, we decline to do so with respect to the modifications set forth herein.

[2] Under federal law, a felony is a crime punishable by death or imprisonment for a term exceeding one year. 18 U.S.C. § 1.

[3] Moreover, we retain the discretion to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions.

[4] Rehabilitation is generally a factor when misconduct occurred prior to the filing of the application in question. Whether an applicant has been rehabilitated will necessarily turn on the facts of each case. Among other factors, the Commission will consider: (1) whether the applicant has not been involved in any significant wrongdoing since the alleged misconduct occurred; (2) how much time has elapsed since the misconduct; (3) the applicant's reputation for good character in the community; and (4) meaningful measures taken by the applicant to prevent the future occurrence of misconduct. *RKO General, Inc.*, 5 FCC Rcd 642, 644 (1990). Further, where previous Commission consideration of the misconduct resulted in the denial of an application, the deterrent impact of our previous action may provide a basis for concluding that a recurrence of misconduct is unlikely. *Id.*

[5] However, we also continue to believe that, where an applicant has allegedly engaged in nonbroadcast misconduct "so egregious as to shock the conscience and evoke almost universal disapprobation," such conduct "might be a matter of Commission concern even prior to adjudication by another body." *Character Policy Statement*, 102 FCC 2d at 1205, n.60.

[6] As indicated in the *Character Policy Statement*, non-FCC misconduct is considered to have been adjudicated when the "ultimate trier of fact" renders its decision. Generally, the "ultimate trier of fact" is that tribunal whose factual findings are not subject to review *de novo*. 102 FCC 2d at 1205 n.62. We will continue to consider adjudications by the "ultimate trier of fact" during the pendency of any appeal of that decision. 102 FCC 2d at 1205.

[7] At this time, we do not intend to express any further opinion on the issue of a seller's character qualifications. That issue was remanded to the Commission for further consideration in *Coalition for the Preservation of Hispanic Broadcasters v. FCC*, 893 F.2d 1349 (D.C. Cir. 1990). However, the U.S. Court of Appeals for the District of Columbia Circuit has since granted our petition for rehearing *en banc*. *Order* in Case No. 87-1285, March 27, 1990. We will therefore address the issue of seller qualifications in a separate proceeding.

[8] Currently, only new applicants, assignees, and transferees are required to provide such information.

[9] Accordingly, we find for good cause that notice and comment is not required for this rule change. *See* 5 U.S.C. § 553(b)(B).

[10] Because this rule change is procedural, notice and comment are not required. *See* 5 U.S.C. § 553(a)(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 15, 1990

Released: May 15, 1990

Charles M. Firestone, Esq. 8330-B
Mitchell, Silberberg & Knupp C4-199
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683

Dear Mr. Firestone:

This is in response to your inquiry on behalf of Adlink, a company which acts as an advertising sales representative for a network of cable television systems in Southern California. You declare that Adlink, a partnership of eight cable television companies, sells national and regional spot advertising to be carried on basic cable channels and delivers the spots by satellite to its affiliates. In addition to the eight partner systems, Adlink represents other cable systems and, collectively, Adlink is comprised of cable systems serving 1,100,000 subscriber homes.

Your request also includes the following information. Adlink is presented to advertising agencies as a means for reaching an audience on a marketwide basis, as opposed to purchasing from separate cable systems. Adlink sets the rates for the network time and is given the right to sell up to 50% of the inventory of a cable system's basic cable channels. Each affiliate cable system is compensated by Adlink in accordance with the number of its subscribers. The remaining inventory is sold by the individual systems who set their own rates.

You ask about the applicability of the "lowest unit charge" (LUC) provision to Adlink's sales, particularly "whether or not the time sold and delivered by Adlink is the same 'class' of time as that sold by the individual cable systems."

Section 315(b) of the Communications Act, as amended, (47 U.S.C. Section 315(b)), requires that during the 45 days preceding a primary election and the 60 days preceding a general or special election, broadcasters and cable system operators must provide legally qualified candidates with the LUC of the station or cable facility for the "same class and amount of time for the same period." In enacting the LUC provision in 1972, Congress expressed its intention to place candidates on a par with a station's or cable system's "most favored commercial advertisers." S. Rep. No.96, 92d Cong., 1st Sess., 27 (1971).

As your request notes, the Commission has held that compensation received by individual broadcast station affiliates of a network for advertising sales generated by the network need not be included in the affiliate's LUC calculations. *The Law of Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1514 (1984); *Robert L. Olender*, 61 FCC 2d 694 (B/c Bur. 1976)("no commercial advertiser, even the 'most favored,' would be able to go directly to the station and receive a rate comparable to that which is offered to the network."); *Michael H. Bader*, 56 FCC 2d 840 (B/c Bur. 1975)("each station charges [the network] a rate which would not be available to that station's most favored commercial advertiser for time sold on that station alone.") In reaching these decisions, we reasoned that network advertising rates are, in effect, a special "package rate" unavailable to even the most favored commercial advertiser who chooses to buy time directly from an individual network affiliate.

We see no reason for treating Adlink's network relationship with its cable system affiliates any differently from the broadcast station networks described in the above-cited decisions. Thus, the rates paid by Adlink to its affiliates are not required to be included in the affiliate's LUC calculations in connection with sales of time made by the affiliate system. Adlink pays its affiliates a lower rate than is generated by the affiliate, even on spots sold to the affiliate's most favored commercial advertisers, based on the network's success in combining large numbers of households via its network of cable systems. *See Robert Olender, supra.* The individual cable system benefits from Adlink's ability to attract regional and national advertisers who otherwise might not be interested in purchasing time on a single cable system. *Id.* The LUC provision is not thwarted because any candidate who chooses to buy time from Adlink must be given the network's LUC for the various kinds of time it sells commercial advertisers. Correspondingly, a candidate who buys time directly from an Adlink affiliate must be provided that individual cable system's LUC for the various classes of time it offers commercial advertisers.

Based on the foregoing, we believe that your request that rates paid by Adlink to its affiliates be excluded from LUC consideration by the affiliates is consistent with Congress' intent and Commission precedent in this area.

Staff action taken pursuant to delegated authority.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 86-337

In the matter of

An Automatic Transmitter
Identification System for Radio
Transmitting Equipment

FIRST REPORT AND ORDER

Adopted: April 13, 1990; Released: May 17, 1990

By the Commission:

I. INTRODUCTION

1. This order addresses an automatic transmitter identification system (ATIS) for video satellite uplinks. An extensive record has been produced pursuant to a Notice of Proposed Rule Making and Notice of Inquiry adopted August 7, 1986, a Further Notice of Proposed Rule Making adopted June 10, 1987 and an Oral Proceeding held on May 16, 1988.

2. The great majority of commenters support the establishment of ATIS. However, the technical methodology to employ and test procedures for selecting the methodology have been in dispute.

II. BACKGROUND

3. Radio frequency interference to satellite video uplinks is both accidentally and deliberately induced. The nature and extent of these incidents are reflected throughout the filings in these proceedings. In fiscal year 1988 satellite operating companies asked the Commission to assist in resolving ongoing satellite radio interference problems 59 times. All of the problems appeared to be accidental with nearly 90 percent attributable to human error. The source of the interference eventually was identified in approximately one-half of the cases. Causes of the problems, in order of times occurring, were polarization error, uplink at wrong time, uplink to wrong transponder, and uplink to wrong satellite.

4. The number of interference cases reported to the Commission represents a small fraction of the interference occurring. Most interference problems are not reported by the user or satellite operating company interfered with. Only Western Union has consistently reported such interference to the Commission. Although, the percentage of downtime attributable to interference is a fraction of one percent, even that level is unacceptable to the industry, and improvement is needed.

5. In terms of absolute outage attributed to interference the time is small but there is virtually no tolerance for any outage because of the nature of the product being distributed. Services affected include broadcast programming, publishing, financial exchanges, and the interference represents missed revenues, often disrupts millions of viewers, projects an unprofessional image and can produce serious complications. The operators of the uplink equipment are a fragmented group whose training and experience vary from company to company. The incentives to the licensee are to deliver his own product without regard to interference caused to other satellite users.

6. Relying upon the *Phase II Final Report* submitted by the FCC Advisory Committee on Reduced Orbital Spacing, the Commission has proposed ATIS as a method of countering radio interference problems. In the earlier phases of this proceeding, the Commission has established that the basic elements of an ATIS for video satellite uplinks would include signal availability at all times, even during tune-up; no degradation of transmitted video; detectability under normal modulation conditions; and allowance of flexibility for utilizing the transponder bandwidth.

III. DISCUSSION

7. Commenters proposed various technical approaches to implementing ATIS, and a detailed record exists on the merits of each proposal. We have concluded that a single universal ATIS technology is necessary to assure rapid detection and to control deciphering complexity and cost.

8. Commenters in this Proceeding are broadly categorized into several groups. First are those supporting more time to study, test or bring to market an ATIS product. Typical are the comments of Westinghouse Broadcasting Company, Inc. (Group W) to the Oral Proceeding. Group W stated " . . . before any final requirements are adopted, Group W believes the best course of action would be to hold this proceeding in abeyance for a definite period of no more than eighteen months to provide additional time for system research, development and testing. Otherwise, the method selected could be obsolete even before it is completely implemented. In this period, the developmental process would be further enhanced through the establishment of an industry advisory group directed to recommend a method meeting all of the Commission's criteria for a practical identification system."[1]

9. Interested parties have had over two years to develop ideas and conduct tests. The industry has been innovative in developing ATIS methods during this period and we are not aware of further progress since the Oral Proceeding. Therefore, we conclude that additional time or discussion will not add substantially to the proposals before us.

10. A second group of participants, including American Telephone and Telegraph (AT&T) and Hughes Communications Galaxy, Inc. (Hughes), support an energy dispersal based ATIS as set forth in the Commission's Further Notice. Here identification information is digitally modulated on an existing energy dispersal signal at a low bit rate. This, in turn, is frequency modulated on the main transponder carrier. AT&T provided comments pointing out the virtues of an energy dispersal based ATIS. AT&T also states "We believe that either system (energy dispersal or subcarrier) can perform the ATIS function satisfactorily. AT&T has no interest in exploiting the market for ATIS equipment as a supplier; it has only a nominal interest as a customer for ATIS equipment. AT&T will accommodate itself to the industry consensus."[2]

11. Although, energy dispersal ATIS is supported on a theoretical basis, there has been no demonstration of the practical implications of utilizing energy dispersal ATIS on a variety of operating satellite video uplinks. The Commission requires more assurance as to the applicability of this new technology prior to proceeding further with its review.

12. In the Proceeding several parties including National Broadcasting Company, Inc. (NBC) and GTE Spacenet Corporation (GTE) supported the vertical interval based ATIS. Here the identification is placed on a line in the vertical blanking interval of the video signal. NBC presented information and test data demonstrating that their Source Identification Automatic Measurement of Lineup (SID AMOL) system had been modified to overcome some of the initial shortcomings of a vertical interval based ATIS. For example NBC stated "the SID AMOL identifying signal is present at all times when the transmitter is turned on, even when no video picture is being transmitted, because VBI ATIS systems generate a sync signal that modulates the carrier even absent a video transmission. The ATIS could be included in the exciter . . ."[3]

13. The work that NBC has undertaken to advance an acceptable ATIS is commendable. Based on the record, the vertical interval system should often reveal the source of an interfering transmission to a victim. However, a SID AMOL ATIS is somewhat less interceptable than other systems because of the higher signal to interference ratio required. It would also require processing of the video to insert and strip the ATIS signal. The industry wants a very interceptable ATIS signal. Parties such as Maximum Service Telecasters and United Video, Inc. also voice opposition to the loss of the vertical blanking interval for other potential uses. SID AMOL ATIS may also not be compatible with advanced television systems, because of uncertainty as to availability of the vertical interval.

14. Since some broadcast network satellite users are already using SID AMOL, we will allow these stations to continue this ATIS method on a waiver basis in lieu of other ATIS requirements. The Commission, therefore, will allow stations to broadcast ATIS information on a SID AMOL signal in lieu of the method adopted in this First Report and Order. This system will be grandfathered so long as the station utilizes transmitting equipment manufactured prior to March 1, 1991.

15. In a subcarrier based ATIS system, the identification in digital format is applied to a subcarrier above the video signal and inserted at the input to the FM modulator of the satellite uplink signal. Home Box Office (HBO) developed and tested a subcarrier ATIS prototype and submitted its findings as part of the record in this proceeding.

16. During the pendency of this proceeding the concept of a subcarrier based ATIS has gained support. In the Oral Proceeding Hughes stated "due to the urgency of the need for ATIS, we favor the subcarrier method as the most practical, easiest to implement and cost/effective approach to the problem."[4] The Satellite Operators and Users Technical Committee (SOUTC) now "recommends that the Commission permit operators and users to employ either a subcarrier ATIS system similar to the one endorsed by Home Box Office . . . or a vertical blanking interval-based ATIS system . . . ."[5] Most commenters now find a subcarrier ATIS to be an acceptable system. A subcarrier based ATIS is operationally ready, relatively inexpensive, very interceptable, compatible with various video systems and can become an integral part of the transmitter. For these reasons, we conclude that subcarrier ATIS provides the preferred approach.

17. The commenters recommended specific technical parameters for subcarrier ATIS. An International Morse Code character set, with frequency shift keying of 800 Hz + 10%, on a subcarrier of 7.1 MHz, deviation of 25 kHz peak, injection level at -26 dB and a rate of 15 words per minute were generally endorsed.

18. Unanimous support for one single subcarrier frequency was not obtained. Conus Communications Company Limited Partnership (Conus) contends, contrary to the assertion of HBO, a special problem with subcarriers in the 7 to 10 MHz range when utilizing a half transponder mode of transmission. Conus stated "Use of a subcarrier in that range when operating in the half transponder mode, however, produces undue degradation to the video and aggravates cross talk between the two video carriers in the transponder. Conus has performed extensive tests in the development of its half transponder video system and has conducted numerous experiments with higher frequency subcarriers. As a result of Conus' considerable experience, Conus will not allow any subcarrier energy above 6.2 MHz in a half transponder."[6] No substitute subcarrier frequency was recommended by Conus.

19. Although, the Commission does not want ATIS to restrict the use of a satellite transponder, we believe it is necessary to specify distinct subcarrier frequencies for a subcarrier based ATIS. Known discrete frequencies are essential to the detection process.

20. Two commenters, HBO and Hughes, presented one distinct frequency for consideration, 7.1 MHz. Only Conus objected to this frequency. We will adopt this one recommended and tested value. However, if a 7.1 MHz subcarrier proves incompatible with a particular video modulation scheme, a second or even third subcarrier frequency could be authorized at a later date. To simplify this process, the Common Carrier Bureau can grant and publish general waivers for additional ATIS subcarrier frequencies. A waiver applicant must show how the existing authorized subcarrier(s) is incompatible with a proposed operating scheme.

21. The commenters have suggested a code speed of 15 words per minute and a modulating mark tone of 800 Hz +/- 10 percent. These values are satisfactory and will be permitted. However, we will expand the windows and set the speed to 15 to 25 words per minute and the mark tone to 1200 Hz +/- 800 Hz. This will provide compatibility with other morse identification equipment as now specified for land mobile services and possibly will reduce equipment costs.

22. The following identification format was proposed in an earlier item as (1) the station call sign, (2) a unique ten digit serial or random number that cannot be easily changed by the station operator and (3) a ten digit telephone number providing immediate access to the station operator. Commenters have suggested various modifications to this format such as including a location, including a licensee name, deleting the serial number and permitting internal information along with the ATIS stream.

23. We believe that the identification format as proposed is the minimum required to uniquely identify the transmission. Yet those who want to provide additional information for internal purposes can be accommodated.

We will require that the three part identification be repeated at no less than 30 second intervals. Thus, some additional information can be included if desired.

IV. ADOPTED REGULATION

24. We are requiring that all earth station broadband video satellite uplinks subject to the regulations of 47 CFR Part 25 transmit a subcarrier modulated with ATIS information for the primary purpose of resolving interference. The ATIS signal shall provide a continuous stream of International Morse code characters identifying the uplink station.

25. The regulations are set forth in the APPENDIX to this First Report and Order. A date of March 1, 1991 is set for implementation.

V. REGULATORY FLEXIBILITY FINAL ANALYSIS

26. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

A. Need and purpose of this action:

27. The regulations adopted by this action are an effort to reduce interference to satellite video uplink transmissions. An interfering signal cannot usually be identified in a timely manner, so the operators responsible remain anonymous and interference continues. ATIS provides a means of identifying the signals in order to apply quick corrections and make the station licensees and operators more responsible for their actions.

B. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

28. (1) Commenters have indicated that the cost figure of each ATIS encoder should approximate 2000 to 3000 dollars. We believe that our initial estimate of 1000 units at 2000 dollars per unit is substantially correct. This is a very small incremental cost to the total investment for each earth station.

29. (2) Some commenters have demonstrated that they presently employ a form of ATIS that meets the needs of this Rule Making. We have indicated that this equipment which is now in operation or employed on transmitting equipment manufactured before March 1, 1991 can substitute for the adopted ATIS.

C. Significant alternatives considered and rejected:

30. A number of different alternatives were considered and rejected including energy dispersal and vertical interval blanking. We believe that the adopted system is the most reasonable course of action.

VI. PAPERWORK REDUCTION ACT STATEMENT

31. We anticipate less than 10 applications per year for additional ATIS subcarrier frequencies. Therefore, the application request is not subject to the requirements of section 3507 of the Paperwork Reduction Act (44 U.S.C. 3507).

VII. ORDERING CLAUSES

32. It is ordered, that a copy of this *First Report and Order*, including the Final Regulatory Flexibility Analysis, shall be sent to the Chief, Counsel for Advocacy of the Small Business Administration.

33. It is further ordered, that under authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 25 of the Commission's Rules are amended as set forth in the attached Appendix, effective March 1, 1991.

34. Further information on this proceeding may be obtained from John R. Hudak at 202-632-6977.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 25 of the Commission's Rules is amended as follows:

Section 25.206 is revised to read as follows:

Section 25. 206 Station Identification

* * * * *

The requirement for transmission of station identification is waived for all radio stations licensed under this part with the exception of satellite uplinks carrying broadband video information which are required to incorporate ATIS in accordance with the provisions set forth under Section 25.308 of these Rules.

Section 25.308 is added to read as follows:

Section 25.308 Automatic Transmitter Identification System (ATIS)

* * * * *

All satellite uplink transmissions carrying broadband video information shall be identified through the use of an automatic transmitter identification system as specified below.

a) Effective March 1, 1991, all satellite video uplink facilities shall be equipped with an ATIS encoder meeting the specifications set forth in Subsection (d).

b) All video uplink facilities utilizing a transmitter manufactured on or after March 1, 1991 shall be equipped with an ATIS encoder meeting the performance specifications set forth in Subsection (d) and the encoder shall be integrated into the uplink transmitter chain in a method that cannot easily be defeated.

c) The ATIS signal shall be a separate subcarrier which is automatically activated whenever any RF emissions occur. The ATIS information shall continuously repeat.

d) The ATIS signal shall consist of the following:

1) A subcarrier signal generated at a frequency of 7.1 MHz +/-25 KHz and injected at a level no less that -26 dB (referenced to the unmodulated carrier). The subcarrier deviation shall not exceed 25 kHz peak deviation.

2) The protocol shall be International Morse Code keyed by a 1200 Hz +/- 800 Hz tone representing a mark and a message rate of 15 to 25 words per minute. The tone shall frequency modulate the subcarrier signal.

3) The ATIS signal as a minimum shall consist of the following:

i) The FCC assigned earth station call sign;

ii) A telephone number providing immediate access to personnel capable of resolving on-going interference or coordination problems with the station;

iii) A unique ten digit serial number or random number code programmed into the ATIS device in a permanent manner such that it cannot be readily changed by the operator on duty;

iv) Additional information may be included within the ATIS data stream provided the total message length, including ATIS, does not exceed 30 seconds.

FOOTNOTES

[1] Further comments of Group W dated June 30, 1988 at 2-3.

[2] Testimony of Robert Hedinger, Technical Supervisor, on behalf of AT&T at 2.

[3] Comments of NBC dated June 30, 1988 at 4.

[4] Comments of Hughes dated May 11, 1988 at 1.

[5] Comments of SOUTC at 2.

[6] Comments of Conus dated June 29, 1988 at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-226

In re Applications of

SALTAIRE COMMUNICATIONS, INC. (hereafter "SCI")	File No. BPH-880229NG
STONINGTON COMMUNICATIONS, L. P. (hereafter "Stonington")	File No. BPH-880301NP
CHARLES S. FITCH, P. E. (hereafter "Fitch")	File No. BPH-880301NW
WHSL CORPORATION (hereafter "WHSL")	File No. BPH-880301OF
KATHLEEN HINDS (hereafter "Hinds")	File No. BPH-880301OX

For Construction Permit
for a New FM Station on
Channel 299A (107.7 MHz)
in Pawcatuck, Connecticut

HEARING DESIGNATION ORDER

Adopted: April 13, 1990; Released: May 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Stonington*. On April 18, 1988, Fitch filed a petition to dismiss Stonington's application alleging that Carl Grande, 51% owner of Stonington, had filed inconsistent applications in violation of the Commission's multiple ownership rules. Fitch alleges that Grande is a 50% general partner in C.G. Associates of Narragansett ("CGA"), an applicant for a new FM station at Narragansett Pier, Rhode Island (BPH-870313NU) and that the 1 mV/m contour of that proposal overlaps the 1 mV/m contour of Stonington's instant proposal. Additionally, Fitch asserts that although the Stonington application lists Grande as a limited partner with no vote, there is no indication that he will not be materially involved in the prosecution of the application for, and operation of, the proposed FM station.

3. Upon review of these contentions, we note that Stonington has in fact stated affirmatively in Section II, Item 3(a), FCC Form 301, that no limited partner would be involved in any material respect in the management or operation of the proposed station. Therefore, the interest of Carl Grande is not attributable under the standard set forth in the *Report and Order, Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable and Newspaper Entities*, 55 RR 2d 1465 (1984), *recon. granted in part*, 58 RR 2d 604 (1985). Accordingly, since no violation of the Commission's multiple ownership rules is present in this instance, the petition to dismiss filed by Fitch will be denied.

4. *WHSL*. On December 12, 1988, Fitch filed a petition to deny WHSL's application alleging that WHSL's contour map fails to meet the Commission's requirements for such a map. Fitch argues that the contour map is not a Sectional Aeronautical Chart, as is contended by WHSL, thus preventing the staff from determining the accuracy of the scale of the map and other key information. In response, WHSL contends that the map used is a "Sectional Base Map," upon which the various symbols seen on the "Sectional Aeronautical Chart" are printed. WHSL acknowledges that such maps are no longer available, a point raised by Fitch as well. Fitch has countered that WHSL has provided no evidence to support the origins of the questioned contour map, which it claims has never been heard of by a staff member at the Federal Aviation Administration. Fitch also notes that the Connecticut coastline on the contour map differs from that on a Sectional Aeronautical Chart. Finally, on January 23, 1989, WHSL submitted, an amendment to show the origins of its Base Map. The acceptance of this amendment is contested by Fitch on the grounds that the amendment is untimely filed without the required good cause showing, thus violating 47 C.F.R. § 73.3522 and, further, that the amendment is not properly signed pursuant to 47 C.F.R. § 73.3513.

5. Item 4g of Appendix D in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), requires that contour maps comply with requirements of Item 10 (Item 16 in the updated form used by WHSL) of Section V-G, Form 301, and to provide clearly and legibly the 60 and 70 dBu contours and the legal boundaries of the community of license. Item 16 requires the map used to provide a distance scale, the source of the map, and the original latitude and longitude markings. Each of these items has been provided on WHSL's contour map (although Fitch may disagree as to their correctness). Consequently, WHSL's application was properly accepted for tender by the staff.

6. Further, we note that neither of these items lists a requirement to use a Sectional Aeronautical Chart. WHSL is therefore free to utilize any map it desires. Fitch has not demonstrated that the base map employed is inaccurate; rather, it has demonstrated that it is now unavailable. Therefore, Fitch's arguments with regard to the map's basis will be rejected. However, Fitch has advanced one argument that merits further consideration. The discrepancy in the Connecticut coastline noted by Fitch is apparently due to WHSL's freehand tracing of the coastline. This discrepancy is not an acceptability deficiency as no rule section is violated. However, WHSL will be required to submit to the presiding Administrative Law Judge, within 30 days of the release of this Order, a

clarifying amendment to clearly show the actual Connecticut coastline. In addition, a redetermination of the area and population within the 60 dBu contour will be required, to ensure that these figures were determined using the actual land area. Accordingly, the petition to deny will be granted to the extent indicated herein and will be denied in all other respects.

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES FILED
SCI	December 28, 1989 (Engineering)
Stonington	March 24, 1989 (Engineering)
WHSL	January 23, 1989 (Engineering)

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Stonington and Hinds would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Stonington and Hinds would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the petition to deny filed by Fitch on December 12, 1988 against Stonington and the opposition filed by Fitch on April 17, 1989 against Stonington's March 24, 1989 petition for leave to amend ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the petition to dismiss filed on April 18, 1988 by Fitch against Stonington's application IS DENIED.

14. IT IS FURTHER ORDERED, That WHSL shall submit an amendment in accordance with paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That the petition to deny filed on December 12, 1988 by Fitch against WHSL's application IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by SCI, Stonington, and WHSL ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On December 12, 1988, Fitch filed a petition to deny Stonington's application and on April 17, 1989, Fitch filed an opposition to Stonington's March 27, 1989 petition for leave to amend. The petition and opposition are essentially pleadings to specify issues. Since the Commission's *Report and Order* in re

Revised Procedures for the Processing of Conested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-248

In re Applications of

FIVE STAR BROADCASTING, INC. (hereafter "Star")	File No. BPH-880714MU
TERRACE COMMUNICATIONS, INC. (hereafter "Terrace")	File No. BPH-880714NV
TRANSMEDIA, INC. (hereafter "Transmedia")	File No. BPH-880714NW

For Construction Permit for a
New FM Station on Channel 293A
(106.5 MHz) in
Pocomoke City, Maryland.

HEARING DESIGNATION ORDER

Adopted: April 30, 1990; Released: May 29, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Star*. Star proposes to locate its antenna on the existing tower of WDVM(AM), Pocomoke City, Maryland. Star shows the height of this tower as being 328 feet (100 meters) above ground level. However, the Commission's records show the height above ground for the tower as being 324 feet. Because Star clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, "drawing on the application as a whole", confidently verify the transmitter location by taking official notice of the site coordinates and tower height as found in the Commission's files for the licensed co-located facility. Accordingly, Star's application was found acceptable for filing; however, Star will be required to file a clarifying amendment as to the tower height with the presiding Administrative Law Judge within 30 days after the release of this Order.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Star file a clarifying amendment regarding the information in paragraph 2, above, with the presiding Administrative Law Judge within 30 days after the release of this Order.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-134

In the Matter of

Amendment of the Maritime Services
Rules (Part 80) to increase
the mileage limit contained
in the general exemption
for small passenger vessels
operated on domestic voyages.

ORDER

Adopted: May 18, 1990; Released: May 21, 1990

By the Chief, Private Radio Bureau:

1. On March 8, 1990, the Commission adopted a *Notice of Proposed Rule Making* in the above captioned matter. The specified filing deadlines for comments and reply comments were May 21, 1990, and June 5, 1990, respectively.

2. On May 14, 1990, the Radio Technical Commission for Maritime Services (RTCM) filed a motion asking us to permit it to file comments and reply comments on June 25, 1990, and July 16, 1990, respectively. The RTCM is a non-profit organization that seeks, among other things, to improve the efficiency and capability of marine communications. Its members include experts on the issues here. The RTCM states that the additional time requested will permit it to coordinate responses more effectively with members of the maritime community.

3. We find that the participation of the RTCM and others in this proceeding will serve the public interest, and that good cause exists to grant the RTCM's request. By extending the filing deadlines, we afford the RTCM and other interested parties a fuller opportunity for such participation.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Sections 0.331 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.46, that the RTCM's motion for extensions of time IS GRANTED. The filing deadlines for comments and reply comments are extended to June 25, 1990, and July 16, 1990, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs
Acting Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-258

Amendment of Section 22.922 of the Commission's Rules to permit limited transfers and assignments of applications in Rural Service Areas

NOTICE OF PROPOSED RULE MAKING

Adopted: May 4, 1990; Released: May 30, 1990

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rule Making, we propose to revise Section 22.922 of the Commission's Rules, 47 C.F.R. Section 22.922, which prohibits the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas (RSAs) prior to the grant of a construction authorization. Specifically, we propose to exclude wireline carriers from this rule and to amend Section 22.922 to exempt from this prohibition transfers involving non-wireline carriers which occur under a number of circumstances enumerated in the proposed rule.

II. BACKGROUND

2. In 1983, the Commission allocated spectrum for the cellular service. *See Cellular Communications Systems*, (Cellular Systems), 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983). Subsequently, it chose lotteries as the method for selecting among competing applicants. *See Cellular Lottery Rule Making*, 98 FCC 2d 175 (1984), *recon.*, 101 FCC 2d 577 (1985), *further recon.*, 59 Rad. Reg. 2d (P & F) 407 (1985), *aff'd in part and rev'd in part, Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987). As a result of the implementation of a lottery selection process, the Commission began receiving an increased number of applications for each Metropolitan Statistical Area (MSA). In *Cellular Lottery Reconsideration Order*, 101 FCC 2d at 604, the Commission revised its lottery selection procedures in order to reduce the incentive for applicants to file "sham" or speculative applications.

3. In a subsequent proceeding, the Commission created Rural Service Areas (RSAs). In *Amendment of the Commission's Rules for Rural Cellular Service, First Report and Order*, 60 Rad. Reg. 2d (P & F) 1029, 1037 (1986), the Commission determined that the public interest would be served by generally adhering to the application procedures prescribed for MSA market numbers 121-305 when processing RSA applications. It stated, in so holding, that adoption of these rules would ensure that cellular service was provided to rural America on an expedited basis. *Id.* at 1040-41. However, the Commission had received over 97,000 applications for MSA markets, and it expected an even larger number of RSA applications. Moreover, the Commission perceived problems with regard to speculative and sham applications in the MSA filings. *See, e.g., Christina Communications*, 2 FCC Rcd 1971 (1988); *Theodore Jones*, 3 FCC Rcd 3555 (1988). It therefore took remedial action and adopted more stringent rules. For instance, the Commission strengthened the financial qualification requirements in Section 22.917. *Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order*, 4 FCC Rcd 2542 (1988). The Commission also adopted Section 22.922. *Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 4 FCC Rcd 2440 (1988).

Section 22.922 of the Commission's Rules provides that:

> (a) Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

In creating this rule, the Commission concluded that it was not in the public interest to allow transfers, assignments or other alienations of pending applications because such transactions disrupt the orderly processing of applications and delay service to the public. Service is delayed because a change in ownership requires that the Commission issue a new public notice and restart the application processing cycle absent a waiver of the cut-off rules. The Commission, therefore, amended its rules to prohibit the alienation of any interest in an RSA application prior to the grant of a construction authorization. *Third Report and Order*, 4 FCC Rcd at 2444.

III. DISCUSSION

A. Waiver Requests

4. During the processing of RSA applications, the Commission has received a significant number of requests for waivers of Section 22.922 for transactions involving the sale of on-going businesses, the redistribution of shares of stock, the public offering of convertible subordinated debentures and *pro forma* transfers from one wholly owned subsidiary to another wholly owned subsidiary of a parent company. For example, in *Modoc RSA Limited Partnership*, DA 89-501 (Mob. Ser. Div. released May 8, 1989), the wireline tentative selectee was granted a waiver of Section 22.922 to effect a transfer of control which was incidental to a large corporate merger. A review of these waiver requests reveals that the majority of these requests involve legitimate business transactions that are unrelated to the filing of cellular applications. *See, e.g., Cellular Inc.*, DA 89-554 (Mob. Ser. Div. released May 23, 1989) (a public offering of convertible subordinated debentures); *Cellular U. S. A., Inc.*, DA 89-804 (Mob. Ser. Div. released July 18, 1989) (redistribution of a small percentage of stock from one shareholder to another); *Washington RSA*

No. 8 Limited Partnership, DA 89-850 (Mob. Ser. Div. released July 31, 1989) (pro forma transfer between two wholly owned subsidiaries of the same parent corporation).

5. The original intent of Section 22.922 was to prevent the alienation of interests in cellular applications prior to the granting of authorizations in order to eliminate unnecessary delays in the provision of cellular service to the public. However, rather than improving the orderly processing of applications, the overbreadth of the rule has resulted in the need for an ever increasing number of waiver requests. It has also placed a burden on the public by requiring the filing of waiver requests in order for legitimate, non-speculative business activities to go forward. This increasing number of waiver requests has also put an additional burden on our limited resources, which in turn impedes our efforts to expedite the provision of service to the public. Therefore, we tentatively conclude that a rule amendment is necessary to limit the scope of the rule.

B. Wireline Exemption

6. We propose to exempt wireline applicants from Section 22.922. We propose this exemption for two reasons. First, while the Commission adopted the rule to eliminate unnecessary delays in the provision of cellular service to the public, *Third Report and Order*, 4 FCC Rcd 2440 (1988), it also was concerned with the underlying problem of speculation. Based upon our experience, we have found that rather than minimizing delays in the processing of wireline carrier applications, the rule has, in fact, placed an additional burden on the public by requiring the filing of waiver requests in order for legitimate business transactions to be concluded. Second, applications submitted by wireline carriers have never presented the speculation problems which we continue to experience with non-wireline carriers. We therefore believe it is in the public interest to exempt wireline carriers from Section 22.922 and to retain a differentiation between wireline and non-wireline carriers.

7. This policy of differentiating between wireline and non-wireline carriers where policy reasons justify different treatment is exemplified by our decision to retain the wireline frequency "set aside" or "fence" through the conclusion of the initial cellular filing periods. *See Cellular Lottery Rule Making*, 98 FCC 2d at 192-198. Applying this policy in the *Third Report and Order*, 4 FCC Rcd at 2441, the Commission concluded that: "[G]iven our previous experience, if we continue to allow partial settlements for non-wireline carriers, we believe that large numbers of applications will be filed by people who are not *bona fide* applicants but who seek to become parts of settlement groups or alliances for speculative purposes." The Commission further concluded that "the prohibition against partial settlements should not apply to wireline applicants. In the previous cellular filing rounds, there has been no problem regarding the sincerity of wireline applications." *Id.* at 2442. We request comment on our proposal to exempt wireline applicants from Section 22.922 and any other alternatives which would serve the public interest.

C. Non - wireline Carriers and the Proposed Rule

8. We also propose to amend Section 22.922 to exempt non-wireline carriers from the prohibition on transfers of interests in RSA applications in those instances where: (1) the transfer is necessary to raise capital (including equity or debt placement) to finance a *bona fide* business need of the applicant or an affiliated company not relating to the RSA application or financing thereof; (2) the transfer is part of a *bona fide* sale of an on-going business to which the cellular applications are merely adjunct or incidental; (3) the transfer is required by a court-ordered decree granting a divorce or enforcing a spousal separation agreement; (4) the transfer is necessitated by the death of the applicant; (5) the transfer involves the routine trading of shares of a publicly traded corporation which does not constitute a transfer of control of the applicant; (6) the transfer is a *pro forma* transfer of control not involving a change in ownership interests; (7) the transfer involves only the alienation of an interest by an existing partner in a partnership that owns an application to another existing partner in the same partnership or between existing shareholders of a closely held corporation and does not effect a transfer of control of the application; and (8) the transfer involves the alienation or exercise of stock warrants or stock options in the application which options or warrants existed prior to the filing of the RSA application.

9. We propose to define the term transfer as a sale, assignment, placement of equity or convertible debt or grant of an option to a third party to purchase the application. If an applicant falls within any one of these exemptions, Section 22.922 would not apply. We propose to retain the essence of Section 22.922 in order to attain the goal of eliminating unnecessary delays in the provision of cellular service to the public and avoid speculation in cellular applications. These proposed changes are not intended to permit the sale of partnership or corporate interests to third parties that were not owners of the applicant when the initial application was filed, except as permitted in Section 22.922 (a) (1), (2), (3), (4), or (5). However, the proposed rule will eliminate the need for many waiver requests by exempting non-wireline carriers who technically violate the rule as a result of engaging in legitimate business transactions totally unrelated to the filing of cellular applications. We request comment on this proposal and any other alternatives.[1]

IV. CONCLUSION

10. We believe that we can reduce the need for unnecessary waivers by amending our rules. The proposed rule is necessary in order to avoid piecemeal decisions on a waiver request basis. We believe we can remedy the adverse effects of this *ad hoc* decision-making process, including attendant delays in service to the public, by excluding business transactions which should never have been included in the rule in the first place. Therefore, we propose to amend the rule as set forth below. We request comment on the proposal and any other possible alternatives.

REGULATORY FLEXIBILITY ACT - INITIAL ANALYSIS

11. *Reason for action and objectives.* The proposed action modifies the rules to prevent unnecessary delays in processing cellular applications. The objective of this proposal is to provide excellent service to the public in the most efficient, uncomplicated, timely and courteous manner possible.

12. *Legal Basis.* The authority for this proposed rule making is contained in Sections 1, 4(i), 301 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 301 and 303.

13. *Small entities affected and potential impact.* We do not expect negative consequences on small entities as a result of this action.

14. *Federal rules which overlay, duplicate, or conflict with this action.* None.

15. *Reporting, record - keeping and compliance requirements.* None.

16. *Specific alternatives that could accomplish the same objectives.* None.

PAPERWORK REDUCTION ACT STATEMENT

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose a new or modified information collection requirement on the public.

EX PARTE PRESENTATIONS

18. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

19. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

20. Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation, Section 1.1206.

21. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 23, 1990,** and reply comments on or before **August 7, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 301, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 301 and 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

23. A copy of this Notice of Proposed Rule Making shall be sent to the Chief Counsel for Advocacy of Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 601, *et seq.).*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Proposed Rules

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 22.922 is revised to read as follows:

22.922 Transfers and assignments of applications, permits or licenses in Rural Service Areas.

Notwithstanding any other sections of this Part, the transfer of any cellular non-wireline application to offer service in Rural Service Areas is prohibited prior to the grant of a construction authorization. The term transfer is defined as a sale, assignment, placement of equity or convertible debt or grant of an option in the application. The following are exceptions to this rule:

(a) the transfer is necessary to raise capital, including the placement of debt or equity, to finance a *bona fide* business need of the applicant or an affiliated company not relating to the RSA application or financing thereof;

(b) the transfer is part of a *bona fide* sale of an on-going business to which the cellular applications are merely adjunct or incidental;

(c) the transfer is required by a court-ordered decree granting a divorce or enforcing a spousal separation agreement;

(d) the transfer is necessitated by the death of the applicant;

(e) the transfer involves the routine trading of shares of a publicly traded corporation which does not constitute a transfer of control of the applicant;

(f) the transfer is a *pro forma* transfer of control from an applicant not involving a change in ownership interests;

(g) the transfer involves only the alienation of an interest by an existing partner in a partnership which owns an application to another existing partner in the same partnership or between existing shareholders in a closely-held corporation and does not effect a transfer of control of the application;

(h) the transfer is a result of the alienation or exercise of stock warrants or stock options where the issuance of the warrants or options preceeded the filing of the RSA application.

FOOTNOTE

[1] This proposal is not intended to alter the Commission's policy established in *Bill Welch*, 3 FCC Rcd 6502 (1988), permitting the transferability of MSA and RSA construction authorizations after a cellular application has been granted. This proposal also does not alter in any way the restrictions contained in Section 22.33(b) of the Rules relating to full and partial market settlements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC.

File No. I-T-C-90-063

Application for authority to acquire and operate facilities for service between Hawaii and the United Kingdom

ORDER AND AUTHORIZATION

Adopted: May 21, 1990; **Released: May 30, 1990**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on Februrary 16, 1990 by GTE Hawaiian Telephone Co., Inc. (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide private line service between Hawaii and the United Kingdom, acquire additional facilities for the provision of such service, and dispose of circuits in the CANTAT-2 cable. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity. The application was placed on public notice on March 14, 1990. No comments were received.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-068 IS GRANTED, and HTC is authorized to:

a. provide private line services between Hawaii and the United Kingdom:

b. lease from US Sprint 2.048 Mbps capacity in a transcontinental cable between Point Arena, CA and Tuckerton, NJ;

c. acquire from AT&T, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate one 2.048 Mbps circuit in the TAT-8 cable between Tuckerton, NJ and Penmarch, France;

d. lease from France Telecom and operate a one-half interest in one 2.048 Mbps circuit in terrestrial cable between Penmarch and Dieppe, France;

e. lease from France Telecom and operate a one-half interest in one 2.048 Mbps circuit in the France-UK3 cable between Dieppe, France and Brighton, England;

f. acquire and operate two units of Digital Circuit Multiplication Equipment;

g. use the facilities in b-f above to provide HTC's regularly authorized services between Hawaii and the UK and beyond;

h. sell to Teleglobe Canada at net book value a one-half interest in 13 voice-grade bearer circuits in the CANTAT-2 cable; and

i. terminate the lease arrangement for voice-grade circuits between Hawaii and Beaver Harbor cable station in Canada as well as circuit multiplication equipment.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF PUERTO RICO, INC. File No. I-T-C-90-070

Application for authority to acquire and operate facilities for direct service between Puerto Rico and Aruba

AT&T OF THE VIRGIN ISLANDS, INC. File No. I-T-C-90-071

Application for authority to acquire and operate facilities for service between the U.S. Virgin Islands and Aruba.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 21, 1990; Released: May 30, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 15, 1990 by AT&T of Puerto Rico, Inc. (AT&T-PR) and AT&T of the Virgin Islands, Inc. (AT&T-VI), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between Puerto Rico and Aruba and between the U.S. Virgin Islands and Aruba. The applications were placed on public notice on March 21, 1990. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Puerto Rico and Aruba by AT&T-PR and between the U.S. Virgin Islands and Aruba by AT&T-VI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-070 and I-T-C-90-071 ARE GRANTED; and

a. AT&T-PR is authorized to:

i. activate seven whole channels in the Puerto Rico terminal of the Puerto Rico - St. Thomas Digital Microwave System (DMS);

ii. acquire, on an Indefeasible Rate of User (IRU) basis, from AT&T-VI and operate a whole interest in seven channels in the St. Thomas terminal of the Puerto Rico -St. Thomas DMS;

iii. activate a one-half interest in seven circuits in the St. Thomas - Venezuela II cable;

iv. lease from Compania Anonima Nacional Telefonos de Venezuela (CANTV) a one-half interest in seven circuits in the Venezuela - Curacao DMS;

v. use for service to Aruba its interest in three circuits in the Netherlands Antilles Cable System (NAG cable) and the Puerto Rico - St. Thomas DMS presently assigned for service to the Netherlands Antilles;

vi. use the facilities in paragraph a above to establish ten operating channels to provide AT&T-PR's regularly authorized services between Puerto Rico and Aruba and beyond;

b. AT&T-VI is authorized to:

i. activate three additional half-circuits in the St. Thomas -Venezuela II cable;

ii. lease from CANTV a one-half interest in three circuits in the Venezuela - Curacao DMS;

iii. use for service to Aruba its half-interest in three circuits in the NAG cable presently assigned for service to the Netherlands Antilles; and

iv. use the facilities in paragraph b above to establish six operating channels to provide AT&T-VI's regularly authorized services between the U.S. Virgin Islands and Aruba and beyond.

3. No material changes insconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T-PR and AT&T-VI and their correspondent in Aruba, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 12

Transmittal No. 2205

ORDER

Adopted: May 17, 1990; Released: May 18, 1990

By the Chief, Common Carrier Bureau:

1. This transmittal offers VTNS Option 38, by which the American Telephone and Telegraph Company (AT&T) will provide voice and data service applications among stations in the U.S., Puerto Rico, the U.S. Virgin Islands, and specific international locations. This Option includes Measured Ports, Rate Option 1 and 2 Measured Remote Ports, Port Access Telephone Numbers, Authorization Codes, Voice Transmission Capabilities (VTCs) and Data Transmission Capabilities (DTCs). AT&T offers Option 38 for a three-year period (also termed the multi-year service period) following substantially complete installation. AT&T Transmittal No. 2205, Description & Justification (D&J) at Section 7.40.1.B.

2. The Basic Charge for Option 38, which includes the availability and use of 497 Measured Ports, 35 Rate Option 2 Measured Remote Ports and certain initial quantities of DTCs and VTCs, is $161,100 per month for the multi-year service period. If ordered before December 1, 1990, the charge is $94,400 per month for the first six full months of service and $161,100 per month for the remainder of the multi-year service period. *Id.* at Section 7.40.2.A. Measured Charges apply to the use of Measured Ports and Measured Remote Ports and are determined based on rate periods and rate mileage. *Id.* at Section 7.40.2.B. A minimum annual charge of $5,210,000 applies if the combination of Basic and Measured charges is less than the Minimum Annual Charge in any given year following substantially complete installation. *Id.* at Section 7.40.2.D.

3. On April 19, 1990, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate the instant Transmittal. AT&T filed a reply on April 30, 1990.

4. Sprint argues that AT&T failed to demonstrate that Option 38 is an integrated service package that is "unlike" its other component services. Petition at 1-2. Moreover, Sprint contends, AT&T's proposal of 44 separate VTNS offerings with similar rate structures makes clear that such offerings are designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Therefore, Sprint asserts, the Commission should order AT&T to offer these rates under a generally available tariff, as in the case of the individual case basis (ICB) rates for the LECs' DS3 service. *Id.* at 2-4. Sprint also alleges that AT&T's cost support "is seriously deficient" and incorporates by reference the arguments it raised in its petitions against VTNS Options 17, 18, and 19, found in AT&T Transmittals 1810, 1826, and 1832, respectively. *Id.* at 4.

5. AT&T asserts that the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. Therefore, AT&T maintains, the rates in Option 38 are not unjustly discriminatory. Reply at 3-4. AT&T also argues that Option 38 is functionally different from individually tariffed services in that it "integrates customers' voice and data transmission needs in an economical, custom design, at rates that reflect AT&T's costs," and includes "an extensive mutual commitment between AT&T and customers as to term, volume, and level of service. *Id.* at 3-4. AT&T further maintains that Option 38 is generally available because the tariff contains no geographical limitations, and because of the express commitments of general availability contained in Tariff 12. *Id.* at 7. Finally, AT&T states that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. These methods, contend AT&T, satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 7-9.

6. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2205, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2205, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 12 — Transmittal No. 2209

ORDER

Adopted: May 17, 1990; Released: May 18, 1990

By the Chief, Common Carrier Bureau:

1. This transmittal offers Virtual Telecommunications Network Service (VTNS) Option 39, by which the American Telephone and Telegraph Company (AT&T) will provide voice and data communications service between stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. This Option includes Measured Ports, Rate Option 1 and 2 Measured Remote Ports, Port Access Telephone Numbers, Type II Authorization Codes, Voice Transmission Capabilities (VTCs), and Data Transmission Capabilities (DTCs). The rates are stabilized throughout a three-year term following substantially complete installation. Provided AT&T and the customer agree, this term may be extended for two additional years. AT&T Transmittal No. 2209, Section 7.41.

2. In general, the basic charge for VTNS under Option 39, which includes the availability of 976 measured ports, 58 Rate Option 1 measured remote ports, 83 rate Option 2 measured remote ports, and a specified quantity of DTCs and VTCs, is $390,000 per month. *Id.* at Section 7.41.2.A. The minimum annual charge is $10,000,000 for the first year following substantially complete installation, $6,000,000 for the second year, and $5,000,000 for the third year. *Id.* at Section 7.41.2.F. When ports, VTCs, or DTCs are added or deleted, this charge will be increased or decreased in accordance with certain specifications. *Id.* at Section 7.41.2.G. Also, volume pricing plans containing discounts for domestic and international use under specified rate schedules apply. *See, e.g., id.* at Sections 7.41.C., 7.41.D, 7.41.2.H.

3. On April 23, 1990, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate the instant Transmittal. AT&T filed a reply on April 30, 1990.

4. Sprint argues that AT&T has failed to demonstrate that Option 39 is an integrated service package that is "unlike" its other component services. Petition at 1-2. Moreover, Sprint contends, AT&T's proposal of 44 separate VTNS offerings with similar rate structures makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Therefore, Sprint asserts, the Commission should order AT&T to offer these rates under a generally available tariff, as in the case of the individual case basis (ICB) rates for the local exchange carriers' DS3 service. *Id.* at 2-4. Sprint also alleges that AT&T's cost support "is seriously deficient" and incorporates by reference the arguments it raised in its petitions against VTNS Options 17, 18, and 19, found in AT&T Transmittals 1810, 1826, and 1832, respectively. *Id.* at 4.

5. AT&T asserts that the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. Therefore, AT&T maintains, the rates in Option 39 are not unjustly discriminatory. Reply at 3-4. AT&T also states that the Commission has consistently found AT&T's costing systems sufficient to support AT&T's Tariff 12 filings. These methods, contend AT&T, satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 7-9.

6. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2209, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2209, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ — **MM DOCKET NO. 83-1206**
Sparks, Nevada — File No. BPH-820519AK

COMSTOCK BROADCASTERS, INC. — **MM DOCKET NO. 83-1207**
Sparks, Nevada — File No. BPH-820628AQ

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1990; **Released: May 30, 1990**

By the Commission:

1. Before the Commission is a decision of the Review Board granting Comstock Broadcasters, Inc.'s application for a new FM radio station in Sparks, Nevada, and denying Pepper Schultz's mutually exclusive application. *Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989).[1] We agree with the Board's resolution of this case. We wish, however, to comment on certain matters.

I. SCHULTZ'S QUALIFICATIONS

2. Previously, the Commission remanded this proceeding for a hearing to determine whether Schultz had viable staffing and financial plans when he filed his application on May 19, 1982. *Pepper Schultz*, 3 FCC Rcd 1200 (1988). (We found no good cause for permitting Schultz to amend these questionable proposals but agreed with Schultz that he should be given a further opportunity to demonstrate the adequacy of his unamended proposals.) We agree with the Board that the record indicates that Schultz was not diligent in formulating his plans and, in fact, did not have viable plans at the time he filed his application.[2]

3. Schultz proposed to operate his station 168 hours a week (24 hours a day) without hiring any employees. 4 FCC Rcd at 2387 ¶ 8. [3] Critical to this proposal was the use of automation equipment, including an automatic transmission system (ATS) -- with a monitoring point located at telephone answering-burglar alarm service -- to regulate the proposed station's technical operations. Schultz also seeks to rely on the use of unpaid volunteers. Schultz's ATS proposal was in violation of former 47 C.F.R. § 73.346, in force at the time he filed his application. *See also Automatic Transmission Systems*, 59 RR 2d 735, 738 ¶ 17 (1986) (47 U.S.C. § 318 continues to prohibit operation unattended by a licensed operator). Moreover, Schultz failed to demonstrate that he had any arrangements to use unpaid volunteers as part of his original proposal. Tr. 220-22, Joint Exh. 1 at 25, 80-81, 84.

4. In seeking to establish his financial qualifications, Schultz claimed to have $17,158 in net liquid assets available. 4 FCC Rcd at 2389 ¶¶ 41-44. He asserts that this amount would be sufficient to cover his estimated three months' operating expenses of $4,430. With respect to construction costs, Schultz claims that he could acquire new equipment by means of a lease agreement. Alternatively, he proposes to purchase used equipment costing $12,550, relying on his net liquid assets. *Id.* at 2388 ¶¶ 28-32.

5. We agree with the Board that Schultz failed to demonstrate his financial qualifications. First, Schultz failed to provide reasonable assurance of a present intention on the part of an equipment supplier to enter into a credit arrangement as required by the application form. Form 301 (Jan. 1982) at 5. Although *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168 ¶ 3 (1980), dispenses with the requirement that a commitment letter specifically indicate that the supplier is satisfied with the applicant's credit-worthiness, it does not dispense with the requirement that the supplier provide reasonable assurance of a willingness to fund a particular proposal. Hence, the Board correctly distinguished this case from *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *rev. denied*, 3 FCC Rcd 4767 (1988), in which such assurances were given. 4 FCC Rcd at 6399-400 ¶ 25. The letters submitted by Schultz (which are dated after Schultz certified his financial qualifications) do not provide such assurance. They are merely statements of the suppliers' customary terms. Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Atts. D, E.

6. We also agree with the Board that Schultz's proposal to rely on used equipment rests on cost estimates that are excessively speculative given the small margin of error provided by Schultz's liquid assets. *See* 4 FCC Rcd at 2388 ¶ 33 (transmitter); *Id.* at 2389 ¶¶ 36-37 (ATS equipment). Indeed, information submitted by Schultz indicates that he received quotations from Transcom Corporation, an equipment firm, which were significantly higher than Schultz's estimates, although they do not include ATS equipment. Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Att. G; Opposition to Motion to Enlarge Issues, filed April 18, 1985, by Pepper Schultz, Att.

7. Finally, despite the fact that the Commission explicitly indicated that it considered the reliability of Schultz's operating costs open to question, Schultz submitted no supporting evidence to corroborate his estimates. *See* Pepper *Schultz*, 3 FCC Rcd at 1202 ¶ 11. We therefore agree with the Board's finding that Schultz's showing is deficient in this regard. We note however, that the Board erred in one respect, in finding that Schultz had not provided for certain items of studio equipment. Schultz indicated that he already owns this equipment. 4 FCC Rcd at 6399 ¶ 24; Submission in Response to Remand Order, filed April 12, 1988 by Schultz, Att. G.

8. These findings indicate that Schultz's original staffing and financial proposals were deficient. Because Schultz's failure to formulate realistic proposals in the first place reflects a lack of diligence -- and because entertaining revised proposals at this time would be unduly disruptive -- Schultz has not demonstrated good cause to amend his financial and staffing proposals as he later sought to do. Accordingly, we adhere to our prior determination in this regard. Thus, Schultz is not qualified to be a Commission licensee.

II. COMSTOCK'S QUALIFICATIONS

9. After the remand, a new issue arose in this proceeding. The Board found that Comstock's principals violated the Commission's ex parte rules by soliciting a letter from [then] Nevada Senator Chic Hecht to the Presiding Judge. This letter expressed a preference for Comstock. Although the Board found that this violation had occurred, it concluded that, consistent with precedent, the violation was not disqualifying. We discern no error in the Board's reading of precedent.

10. As to an additional matter, however, the Board was deadlocked, in that the two members who constituted the panel deciding this case disagreed. In finding Comstock qualified to be a Commission licensee, the Board reversed the determination of Deputy Chief Administrative Law Judge James F. Tierney. *Pepper Schultz*, 4 FCC Rcd 2386 (I.D. 1989). While the panel agreed that the ex parte violation itself did not warrant disqualifying Comstock, they disagreed as to whether the ALJ made an additional finding that Comstock's principals engaged in potentially disqualifying lack of candor. Chairman Joseph Marino believed that the ALJ made such a finding, whereas Member Norman B. Blumenthal believed that he did not.

11. The dispute involves the following from the ALJ's initial decision:

> Messrs. Carroll and Akert [Comstock's principals], both declining to seek "information" on the status of this proceeding from the most likely source, their counsel, throughout this protracted case, chose, instead, contacting the Senator's Office, *were greatly less than candid and forthright* choosing, rather than acknowledging "the obvious fact that a prohibited *ex parte* presentation has occurred," to affirmatively deny any such thing took place, this despite other conduct in evidence[,] Carroll's admission at hearing, among others, that in his letter to the Senator he attempted to point out the merits of the Comstock case and the flaws in Schultz's; taking into account Comstock's admitted wrongdoing as, at most, "an isolated instance," this is trifling with the truth and reprehensible.

4 FCC Rcd at 2396-97 ¶ 94 (emphasis added).

12. We agree with Member Blumenthal that the ALJ's remarks are inadequate to constitute a conclusion that disqualifying lack of candor occurred. The conclusion is not supported by any findings of fact indicating any specific statements or instances of concealment that the ALJ considered to constitute lack of candor. Indeed, at one point during the hearing, the ALJ commented to Carroll: "Of course, you've answered the questions on cross-examination honestly for [Schultz's counsel]." Tr. 474. Thus, the language indicates that the ALJ was faulting Comstock for being unrepentant and arguing against the weight of the evidence -- as opposed to finding that its principals attempted to deceive the Commission as to a material matter of fact. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983).

13. Because the ALJ, before whom the testimony took place, did not add a lack of candor issue or make specific findings concerning a lack of candor, we will not pursue this matter further. We see no basis to act where specific, substantial questions have not been raised.

III. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to File Reply filed October 12, 1989 by Comstock Broadcasters, Inc. IS DENIED,[4] and, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed September 13, 1989 by Pepper Schultz IS DENIED and the Contingent Application for Review filed September 18, 1989 by Comstock Broadcasters, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are pending: (1) an Application for Review filed September 13, 1989 by Pepper Schultz and an opposition filed September 28, 1989 by Comstock Broadcasters, Inc.; (2) a Contingent Application for Review filed September 18, 1989 by Comstock and an opposition filed October 2, 1989 by Schultz; and (3) a Petition for Leave to File Reply filed October 12, 1989 by Comstock, and an opposition filed October 16, 1989 by Comstock.

[2] One matter in particular deserves comment. In ruling on the staffing and financial issues, the Board made findings concerning proposals set forth in an application that Schultz filed for Sparks in October 1, 1981. Schultz complains that the Board erred in considering these proposals because the October 1981 application is no longer pending. We find that any confusion caused by the Board's references to the October 1981 application is inconsequential. Schultz testified that he did not change his staffing plans between October 1981 and May 1982 (when he filed the pending application). Joint Exh. 1 at 15, 19. As to his financial proposal, Schultz testified that, while he kept track of changing costs and revised his estimates in minor respects between October 1981 and May 1982, he did not formulate a new proposal. Joint Exh. 1 at 15-17, 112, 125-26. In the absence of decisionally significant modifications of his proposals between October 1981 and May 1982, the Board's references to the earlier application are not misleading and do not prejudice Schultz.

[3] Schultz now suggests that he could have operated the station as few as 72 hours a week consistent with the Commission's rules. *See* 47 C.F.R. § 73.1740. This was not, however, his proposal. Joint Exh. 1 at 13, 19.

[4] Replies in connection with applications for review of Review Board decisions are not authorized by the Commission's rules. 47 C.F.R. § 1.115(f). Comstock's reply seeks to supplement its arguments with respect to the ex parte issue. The pleadings already filed, however, adequately address this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-237

In re Applications of

FINE ARTS RADIO, INC.
(hereafter: Fine)
Guilford, Connecticut — File No. BPED-880331MB

TOTOKET EDUCATIONAL FELLOWSHIP, INC.
(hereafter: TEF)
North Branford, Connecticut — File No. BPED-880809MW

For Construction Permit for a
New Noncommercial Educational
FM Station on Channel 218A

HEARING DESIGNATION ORDER

Adopted: April 18, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.

2. *Share - time Arrangement.* Neither of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that the issue has been resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement.

3. *307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

4. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

5. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms an conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. § 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in

such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-244

In re Applications of

HUGHES-MOORE ASSOCIATES, INC. (hereafter "Hughes-Moore") File No. BPH-880816NH

ETHEL HUFF (hereafter "Huff") File No. BPH-880817MH

For Construction Permit for a New FM Station on Channel 223A in London, Kentucky

HEARING DESIGNATION ORDER

Adopted: April 30, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Hughes-Moore have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Hughes-Moore would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Hughes-Moore proposes to sidemount its antenna on the existing tower of station WMAK, London, Kentucky. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Hughes-Moore may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Hughes-Moore's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of the proposed station and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, Hughes-Moore is required to so state and give the distance from the base of the tower to the fence. Accordingly, Hughes-Moore will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Hughes-Moore would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Hughes-Moore in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

7. IT IS FURTHER ORDERED, That, in accordance with paragraph 3 above, Hughes-Moore shall submit the environmental assessment required by 47 C.F.R. § 73.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-247

In re Applications of

BONNE BROADCASTING, INC. (hereafter "Bonne")	File No. BPH-880630MK
ELECTRONICS UNLIMITED, INC. (hereafter "Electronics")	File No. BPH-880630MP
ELIZABETH L. COOLEY (hereafter "Cooley")	File No. BPH-8806300A

For Construction Permit for a New FM Station on Channel 262A in Larose, Louisiana.

HEARING DESIGNATION ORDER

Adopted: April 30, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Bonne*. Bonne proposes to sidemount its antenna on the existing KBAU-FM broadcast tower 4 km southwest of Larose, Louisiana. The Commission's data base shows the accepted coordinates for this tower are 29^0 32' 33" N.L., 90^0 24' 29 " W.L. Our examination of Bonne's proposal reveals a discrepancy between the coordinates given and those listed above. Bonne's application shows the tower's coordinates as:

29^0 32' 33" N.L.
90^0 24' 25 " W.L.

Because the applicant clearly proposes to locate on an existing tower licensed to other Commission licensees, and because specific reference is made to this tower in various places in the application in question, the Commission could, "drawing on the application as a whole", confidently verify the transmitter location in the defective application by taking official notice of the site coordinates found in the Commission's files for the licensed colocated facilities. Accordingly, this application is found to be acceptable for filing. However, Bonne will be required to file a corrective amendment which gives the proper coordinates, and includes a new site map, to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Corey J. Callais, owner of 51 percent of Bonne's voting stock and officer and director thereof, is employed by Callais Broadcasting, Inc., licensee of Stations KLEB(AM), Golden Meadow, Louisiana, and KBAU(FM), Galliano, Louisiana, as Station Manager. Theresa D. Callais, owner of 49 percent of Bonne's issued and outstanding voting stock, as well as an officer and director of Bonne, also provides news and public affairs programming for Callais Broadcasting, Inc., licensee of stations KLEB(AM) and KBAU(FM). Although, grant of the proposal before us would not result in a violation of the Commission's multiple ownership rules, it may violate the Commission's cross-interest policy. However, Bonne has represented to the Commission, that in the event it is the successful applicant in this proceeding, Mr. and Mrs. Callais will resign from all positions, and sever all connections with, Callais Broadcasting, Inc. Accordingly, any grant of a construction permit to Bonne in this proceeding will be appropriately conditioned.

4. *Electronics*. The Commission staff has determined that the values for the distances to the 3.16 mv/m contour and the 1 mv/m contour as specified in Item 19 Section V-B of Form 301 are approximately 24 percent and 12 percent too large, respectively. This discrepancy does not affect the acceptability of Electronics' application since the use of either value does not result in a violation of our technical acceptance criteria. Consequently, Electronics' application is acceptable for filing. However, Electronics must submit a corrective amendment which specifies the correct distances to the 3.16 mV/m contour and the 1 mV/m contour, as well as a new contour map and revised areas and population served, to the presiding Administrative Law Judge within 30 days after this Order is released.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify the home address of each of its principals. Electronics and Cooley each have not completed Item 4 correctly. Electronics' application gives a post office box number as the address for its principals. Cooley's application gives a post office box as the address for her residence. Accordingly, Electronics and Cooley each must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Bonne shall submit the corrective amendment required by paragraph 2, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

10. IT IS FURTHER ORDERED, That, in the event that Bonne is the successful applicant in this proceeding, the contruction permit shall be conditioned as follows:

Prior to the commencement of program test authority for this facility, the permittee shall certify to the Commission that Corey and Theresa Callais have severed all connection with Callais Broadcasting, Inc., licensee of stations KLEB(AM), Golden Meadows, Lousiana, and KBAU(FM), Galliano, Lousiana.

11. IT IS FURTHER ORDERED, That Electronics shall submit the corrective amendment required by paragraph 4, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

12. IT IS FURTHER ORDERED, That Electronics and Cooley each shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-266

In re Applications of

BUTTE BROADCASTING COMPANY, INC. (hereafter "BBC") File No. BPH-880714MG

EDWARD E. ABRAMSON (hereafter "Abramson") File No. BPH-880714ND

For Construction Permit for a
New FM Station on Channel 293A (106.5 MHz) in
Orland, California

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. BBC petitioned for leave to amend its application on December 30, 1988. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if either.

5. IT IS FURTHER ORDERED, That the petition for leave to amend filed by BBC IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-267

In re Applications of

ROGERSVILLE RADIO BRAODCASTING (hereafter "Rogersville") File No. BPH-880711MR

EUGENE G. HUTCHENS (hereafter "Hutchens") File No. BPH-880711MS

DORIS HARRISON (hereafter "Harrison") File No. BPH-880711MT

For Construction Permit for a New FM Station on Channel 230A (93.9 MHz) in Rogersville, Alabama

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rogersville*. Pauline Manson, 49 percent owner of Rogersville, is the wife of Charles Manson. Mr. Manson owns 11.1 percent of the voting stock of Big River Broadcasting Corp., licensee of WSBM and WQLT(FM), Florence, Alabama. He is also an officer and director of the licensee corporation, and he is General Manager of the stations. Mrs. Manson is also employed at the station. However, the Mansons have indicated their intent to divest their interest in and terminate their relationship with Big River Broadcasting Corporation in the event of grant of the referenced application. Accordingly, in the event of grant of Rogersville's application, the Mansons will be required to sever all connections with Big River Broadcasting Corporation prior to the commcencement of program test authority.

3. *Hutchens*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Hutchens would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. *Harrison*. Pursuant to 47 C.F.R. § 1.65 applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is to furnish such information as may be appropriate within 30 days. Staff investigation reveals that Harrison failed to report the grant of the assignment of WKNI(AM), Lexington, Alabama (BAL-880627EC), from Allen Cariwile to Doris Harrison on August 29, 1988. Accordingly, Harrison will be required to file an amendment completely and accurately updating her application with respect to her media interest as required by 47 C.F.R. § 1.65.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Hutchens would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That Harrison shall file an amendment which completely and accurately updates her application, as required by 47 C.F.R. § 1.65, with the presiding Administrative Law Judge within 30 days after the release date of this Order.

10. IT IS FURTHER ORDERED, That, in the event of grant of Rogersville's application, Pauline and Charles Manson will be ordered to divest themselves of all interests in and sever all connections with Stations WSBM and WQLT(FM), Florence, Alabama prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-265

In re Applications of

Terry L. O'Quinn, et. al. d/b/a TBJ Broadcasting Partnership (hereafter "TBJ") — File No. BPH-880601ND

Augusta Radio Fellowship Institute, Inc. (hereafter "Fellowship") — File No. BPED-880602MM

For Construction Permit for a New FM Station on Channel 287A (105.3 MHz) in Walterboro, South Carolina

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 30, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Fellowship.* As part of the "program of random checks of the financial qualifications of applicants for construction permits" announced in the Commission's March 19, 1987 *Public Notice* (Mimeo No. 2418), the Bureau required that all applicants in the 1988 Murrells Inlet, South Carolina proceeding furnish documentary proof of their respective financial certifications. (MM Docket No. 88-296) Fellowship, an applicant in the Murrells Inlet proceeding, (BPED-870730MV) submitted deficient documentation as to its financial ability to construct and operate the facilities for the eleven construction permit applications pending at the time of the filing of the Murrells Inlet application. Accordingly, the following issues were added against Fellowship in the Hearing Designation Order:

> 3. To determine with respect to . . . Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth above in this Order, the applicant (is) financially qualified.
>
> 4. To determine (a) whether, in light of the evidence adduced pursuant to issue 3, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.

3. Pursuant to Fellowship's November 10, 1988 request, in a *Memorandum Opinion and Order* released February 1, 1989, the presiding Administrative Law Judge dismissed Fellowship's application with prejudice. The above issues were never tried. These unresolved issues call into question Fellowship's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Fellowship in this proceeding.

4. The applicant listed below petitioned for leave to amend its application on the dates indicated. The accompanying amendments were filed after September 13, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicant	Amendments Filed
Fellowship	September 9, 1988, January 18, 1989 April 10, 1989, January 31, 1990

5. The applications being considered in this proceeding conflict with a pending Rule Making proceeding to modify the frequency of station WJYQ-FM, Moncks Corner, South Carolina, from Channel 288A to Channel 287C2. The Walterboro applications were filed before the petition for Rule Making had been filed. Consequently, the Walterboro applications met all the spacing criteria of Section 73.207(a) of the Commission's Rules and were accepted for filing. Accordingly, we will designate these applications for hearing. However, the construction permit issued to any of these applicants will be conditioned upon the outcome of the WJYQ-FM, Moncks Corner, South Carolina Rule Making proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine with respect to Fellowship, whether, in light of the evidence adduced concerning the deficiencies set forth in the Murrells Inlet, South Carolina Order, the applicant is financially qualified.
>
> 2. To determine (a) whether, in light of the evidence adduced pursuant to issue 1, above, Fellowship made misrepresentations to the Commission or attempted to deceive or mislead the Commission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Fellowship ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That, in the event a construction permit is granted to any applicant in this proceeding, it shall be conditioned upon the outcome of the WJYQ-FM, Moncks Corner, South Carolina Rule Making proceeding.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-257

In re Applications of

LA STAR CELLULAR TELEPHONE COMPANY — File No. 27161-CL-P-83

For a construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana, MSA

and

NEW ORLEANS CGSA, INC. — File No. 29010-CL-P-83

To amend its construction permit for facilities operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNK224, in the New Orleans, Louisiana MSA — File No. 29181-CL-P-85

ORDER DESIGNATING APPLICATIONS FOR HEARING

Adopted: May 4, 1990; Released: May 31, 1990

By the Commission:

1. La Star Cellular Telephone Company (La Star) and New Orleans CGSA, Inc. (NOCGSA) have filed the captioned mutually exclusive applications to provide cellular service to St. Tammany Parish in the New Orleans Metropolitan Statistical Area (MSA).[1] In addition, both applicants have filed amendments to their applications. Each has filed a petition to deny against the other's application and amendments. Responsive pleadings have been filed. This Order addresses the issues raised in the petitions and related pleadings, and designates the applications for a comparative hearing.

I. BACKGROUND

2. New Orleans CGSA, Inc., (NOCGSA) currently holds a license to operate a cellular system on frequency Block B in the New Orleans MSA.[2] Its application for initial cellular service proposed to cover only that portion of the MSA containing the city of New Orleans and was granted in July 1983. When NOCGSA filed its original application for cellular service in the New Orleans MSA, there were no other applicants who filed an application for frequency Block B. On August 17, 1983, shortly after receiving its initial construction permit, NOCGSA filed the captioned application to enlarge its Cellular Geographic Service Area (CGSA) to include parts of St. Tammany Parish. On September 16, 1983, La Star filed a competing application to serve St. Tammany Parish. La Star's September 16 application proposes six cell sites, which would cover all of St. Tammany Parish and fill the entire northern area of the MSA.

3. The Commission rejected La Star's application as untimely filed because it was an application for initial cellular service which had not been filed within the original filing deadline for such applications. Simultaneously, NOCGSA's August 17, 1983 application was granted upon a finding that it served the public interest, convenience, and necessity. *New Orleans CGSA, Inc.*, CC Mimeo No. 6904 (Mob. Serv. Div. released October 1, 1984), *aff'd*, FCC 85-209 (released May 6, 1985).

4. La Star appealed the dismissal of its application to the U.S. Court of Appeals for the District of Columbia Circuit, arguing that the Commission did not provide notice to potential applicants that they were precluded from filing an electrically mutually exclusive application in response to an application for CGSA expansion by an incumbent cellular licensee. On April 17, 1987, the Court reversed, finding that the Commission had given no notice that competing applications for "fringe" areas filed in response to an incumbent licensee's expansion amendment would be similarly cut off. *Maxcell Telecom Plus v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987) (*Maxcell*). Accordingly, the Court ordered the Commission to reinstate La Star's September 16, 1983 application *nunc pro tunc*.

5. During the time that the Court of Appeals was considering La Star's appeal, NOCGSA filed an application to expand its CGSA in the St. Tammany Parish area (File No. 29181-CL-P-85) which was granted by *Memorandum Opinion and Order*, Mimeo No. 6548, released August 16, 1985. The application proposed larger 39 dBu contours in NOCGSA's St. Tammany Parish cellular system but did not add any cell sites.

6. On September 3, 1987, NOCGSA filed a further application to expand its service area within St. Tammany Parish. NOCGSA's September 3, 1987 application proposed to add cell site Q in St. Tammany Parish at latitude 30 28 57 N, longitude 90 11 44 W. La Star filed a Petition to Deny this application on November 17, 1987. NOCGSA filed an opposition.

7. On September 27, 1987, the Commission, pursuant to the Court's order, reinstated La Star's application and placed it on public notice for thirty days. In the same public notice, the Commission rescinded NOCGSA's license to serve St. Tammany Parish, but granted NOCGSA special temporary authority to continue its operations in that area for 180 days, renewable as required. Both parties were given the right to file amendments. [3] Shortly before the public notice was issued, La Star filed an application for interim operating authority in St. Tammany Parish.[4] The Commission denied this application and affirmed NOCGSA's authority to continue operating in St. Tammany Parish on an interim basis in *La Star Cellular Telephone Co.*, 4 FCC Rcd 3777 (1989), *aff'd*, *La Star Cellular Telephone Company v. FCC*, — F.2d —, slip op. Docket No. 89-1345 (D.C. Cir. March 30, 1990).

8. In addition, NOCGSA and La Star each filed an amendment on October 27, 1987 in response to the September 27 public notice. In its October 27 amendment, NOCGSA proposed an additional expansion of its service

area within St. Tammany Parish, which would add a cell site X at Talishek, 30° 32' 13" W latitude, 89° 51' 57" N longitude.[5] NOCGSA indicates that with these proposals, together with its original application for St. Tammany Parish, its application to provide service in St. Tammany Parish comprises a total of four cell sites.

9. La Star's October 27, 1987 amendment reported an ownership change and new financial arrangements. The ownership change involves the 49% minority interest holder, Star Communications Co. (Star). La Star is a partnership originally comprised of SJI, Inc., the 51% interest holder, and Star. Star, along with its 49% interest, was sold to Telephone and Data Systems, Inc. (TDS), a company with a number of telephone and cellular interests but without a wireline presence in the New Orleans MSA. SJI, Inc., continues to be the 51% owner of La Star. La Star's financial arrangements are changed because TDS will now provide full financing and management services for La Star's proposed cellular system. Each party filed petitions to deny the other's October 27 amendment. Responsive pleadings were filed.[6]

II. PARTIES' CONTENTIONS

A. La Star's Contentions

10. First, La Star argues that NOCGSA's September 3 application and October 27, 1987 amendment to its August 17, 1983 application are major amendments. Therefore, La Star argues, NOCGSA's application to serve St. Tammany Parish, (*i.e.*, its rescinded major amendment license which was returned to pending status on September 27), is cut off and must be dismissed by operation of Section 22.23(c)(3).[7] In its opposition, NOCGSA points out that its license for the captioned application had not yet been rescinded and returned to pending status at the time it submitted its September 3, 1987 filing. Accordingly, NOCGSA argues, the September 3, 1987 filing was not an amendment to a pending application, but rather was a modification application to an existing license. With reference to its October 27 amendment, NOCGSA argues that a pending application may be amended as a matter of right prior to the time the application is designated for hearing. 47 C.F.R. Section 22.23(a). La Star responds that once the *Maxcell* opinion was issued, NOCGSA's grant was void *ab initio*, and that therefore any amendment NOCGSA might file changing its CGSA after the date of the *Maxcell* opinion, was major and cut off the original (captioned) application, requiring dismissal of NOCGSA's captioned application.

11. The second issue La Star raises is whether the Commission's policy against permitting mutually exclusive cellular applicants to file substantive amendments to their applications after they have had an opportunity to examine their competitors' applications, should be invoked (the so-called "one-upsmanship" policy). La Star argues that NOCGSA's September 3 and October 27 amendments to expand its CGSA were merely an attempt to improve its comparative position on the issues of area and population coverage vis-a-vis La Star. La Star argues that this "one-upsmanship" gives NOCGSA an unfair advantage over La Star's competing application. In opposition, NOCGSA points out that the "one-upsmanship" policy to which La Star refers pertains only to applications filed during the initial MSA filing windows, not to the filing of major amendment applications filed after receiving an initial license.

B. NOCGSA's Contentions

12. NOCGSA argues that La Star's application, filed September 16, 1983, is defective and should be returned as unacceptable for filing because it does not satisfy basic cellular qualification criteria. First, NOCGSA argues that La Star's application violates the Commission's fill-in policy.[8] In support of this argument NOCGSA argues that in the *Second Report and Order*, 2 FCC Rcd at 2308, the Commission provided that, for a period of five years from the date of the first construction permit granted in each MSA, fill-in applications would not be allowed. NOCGSA argues that the fill-in policy represents a determination by the Commission that the public interest would best be served by permitting cellular licensees the flexibility to modify their systems according to marketplace demands free from competing applications filed by other cellular applicants. NOCGSA argues that La Star's application should be dismissed pursuant to the Commission's fill-in policy, notwithstanding the fact that La Star's application was filed prior to the issuance of the *Second Report and Order*, because, NOCGSA argues, "if fill-in applications are contrary to the public interest now, La Star's application can be no less contrary to the public interest." Petition at 4.

13. Furthermore, NOCGSA argues, dismissal of La Star's application under the fill-in policy is not contrary to the rule of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*), which generally mandates competitive consideration for mutually exclusive applications. NOCGSA argues that "'[t]here need not be . . . comparative treatment. . . once it has been established that. . . competing applicants [are] basically unqualified,'" citing *Guinan v. FCC*, 297 F.2d 782, 785 (D.C. Cir. 1961). Because La Star's application is not in the public interest, argues NOCGSA, its application should be dismissed.[9] NOCGSA argues that the Commission has established a clear standard for judging whether a fill-in application is in the public interest, and that the Commission "'cannot... arbitrarily treat similar situations dissimilarly,'" citing *Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978), and *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) (*per curiam*) (Commission action inconsistent with its stated objective will be reversed as arbitrary and capricious). NOCGSA avers that nothing in the Court of Appeal's decision in *Maxcell* precludes the Commission from dismissing La Star's application under the fill-in policy. NOCGSA notes that the Court merely ruled that the Commission had erred procedurally and that the Court did not "pass on any substantive standard established by the Commission for judging whether or not an application was in the public interest." Petition at 8.

14. Second, NOCGSA argues that La Star is not eligible to file for wireline frequencies.[10] NOCGSA argues that when Star sold its interest to TDS, TDS acquired control of La Star even though its ownership interest is 49%. Since TDS (which has no wireline presence in the New Orleans MSA) has *de facto* control of La Star, NOCGSA argues, then La Star does not meet the wireline eligibility standards and its application should be dismissed. In support, NOCGSA cites the fact that TDS will provide full financing and managerial services for La Star's proposed

cellular system. NOCGSA also refers to the Joint Venture agreement between SJI (the 51% interest holder) and Star (TDS) which provides, *inter alia*, that TDS would have veto power over the appointment, compensation, and termination of the system's General Manager. The Joint Venture agreement also provides that "all expenses of filing and prosecuting the application for . . . license shall be borne by Star [TDS]," later to be reimbursed by La Star. Indeed, NOCGSA notes that SJI is "not subject to any degree of financial exposure" until after a construction permit has been awarded; among expenditures which have already been made, Star (TDS) has paid a loan commitment fee of $11,250 and has paid all of La Star's legal fees. NOCGSA argues that "SJI is nothing more than a convenient vehicle for. . . TDS to become a wireline cellular operator in the New Orleans MSA. La Star will not have unfettered use of its totally collateralized system. La Star's management will be effectively controlled by TDS. La Star's financing is under the control of TDS, and virtually all monies and profits, if any, will go to TDS as a result of the TDS financing and TDS's indirect ownership interest in La Star." Petition at 15. Moreover, NOCGSA argues, La Star filed a major amendment to its application when it amended its ownership interest and, therefore, La Star's application should be cut-off pursuant to Section 22.31. *See* note 7, *supra*.

15. Third, NOCGSA argues that La Star has failed to demonstrate the applicant's financial ability to meet the realistic and prudent costs of its proposed system as required by Section 22.917 of the Commission's rules. NOCGSA argues that La Star's estimate for the construction of buildings and towers understates the realistic amount by $780,000 for La Star's proposed six cell sites. In addition, NOCGSA argues that La Star's estimate for first-year telephone and interconnect charges understate the cost by $100,800.

16. In opposition, La Star argues that its application should not be dismissed pursuant to the Commission's fill-in policy. It argues that at the time it filed its fill-in application, the Commission had no fill-in policy. La Star points out that the first expression of the Commission's fill-in policy is in footnote 81 in the *Cellular Lottery Order*, subsequent to La Star's application, and that the rule barring fill-in applications for five years promulgated in the *Second Report and Order* cannot be applied retroactively to its application. La Star concedes that while the *Second Report and Order* determined that the Commission could apply its fill-in policy retroactively, the *Second Report and Order* also held that "[b]ecause La Star has already filed. . . we will accept its application as directed by the Court, and process it at a later date." 2 FCC Rcd at 2311 n.8.

17. La Star also argues that to dismiss its application under the fill-in policy would in effect overrule the *Maxcell* decision, which, La Star insists, stands for the proposition that La Star must be given a comparative hearing with NOCGSA's St. Tammany application. La Star argues that applying the fill-in rule to its application would be a retroactive application of a rule, which, La Star argues, is unfair.

18. Second, La Star argues that it is eligible to apply for wireline frequencies in the New Orleans area and that its 51% majority interest holder SJI has control of La Star, not its 49% partner, Star (TDS). La Star argues that Star (TDS) does not have "'power to dominate the Management of the corporate affairs,'" citing *WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969). La Star further argues that the relationship between SJI and Star (TDS) does not rise to the level of *de facto* control as described by *News International, PLC*, 97 F.C.C.2d 349, 355 (1984), and other cases. La Star argues that Star (TDS) does not have the power to dominate corporate affairs or to determine its policies and operation. La Star points out that the Joint Venture agreement prohibits Star (TDS) from constructing, managing, operating, maintaining, or marketing in connection with La Star's proposed cellular system, "[u]nless otherwise authorized or permitted by the FCC." With regard to the supermajority provisions requiring an 80% vote in certain circumstances, La Star argues that these merely protect the rights of the minority investor, citing *McCaw Communications of San Francisco, Inc.*, (Com. Car. Bur., released March 7, 1985), and *News International*. La Star argues that in *News International* the Commission found that, while supermajority provisions make it possible for a minority stockholder to block certain transactions, a minority shareholder does not have the power to compel the company to make major decisions, and therefore such provisions do not enable the minority investor to determine company policy or dominate its affairs.

19. La Star also denies that Star (TDS) dictates the actions of La Star's counsel, even though, as NOCGSA charges, Star (TDS) is solely responsible for reimbursing La Star's counsel. In addition, La Star denies that Section 9.1 of the Joint Venture agreement places control of the partnership in the hands of Star (TDS),[11] arguing that where a party has an option to buy shares, a transfer-of-control issue generally is not raised until the option is exercised, citing *Turner Broadcasting System, Inc.*, 101 F.C.C.2d 843, 849 (1985). Finally, La Star argues that SJI has control of La Star within the meaning of the Commission's criteria for indicia of control as set out in *Public Notice*, Report No. CL-87-1 (released October 2, 1986).[12]

20. Finally, La Star argues that its cost estimates are reasonable and that nothing provided by NOCGSA proves La Star cannot construct and operate its system as proposed. La Star argues that it is not required to demonstrate itemized costs for each cell, citing *Advanced Mobile Phone Service, Inc. (New York)*, 53 Rad. Reg. 2d (P&F) 349, 353 (Com. Car. Bur. 1983).

III. DISCUSSION

21. We will dismiss neither NOCGSA's application as amended, nor La Star's application as amended, as the petitioners request. Instead, we designate La Star's application for hearing on threshold issues relating to La Star's eligibility to apply for a wireline frequency block and, if these issues are resolved in La Star's favor, the captioned applications will be subject to comparative consideration.

A. NOCGSA's CGSA Amendments

22. First, we reject La Star's argument that NOCGSA's September 3 major modification application constituted, at the time it was filed, a major amendment to a pending application. La Star's argument on this point, that NOCGSA's license on the captioned application was automatically revoked when *Maxcell* was issued, is without legal support. The Commission's grant of NOCGSA's captioned St. Tammany application was not directly in issue before the *Maxcell* court. Rather, the Commission's dismissal of La Star's application was in issue. The court ordered the Commission to reinstate La Star's application

nunc pro tunc. The court did not reinstate La Star's application by its order, nor did the court order a return of NOCGSA's St. Tammany application to pending status. Accordingly, when NOCGSA filed its application for a major modification of its CGSA on September 3, 1987, NOCGSA's St. Tammany license was still in a granted status. Since the license had not yet been returned to pending (application) status, the September 3 application did not trigger the cut-off rules pertaining to pending applications at the time it was filed.

23. Second, we will not dismiss NOCGSA's October 27 amendment as La Star requests. Because of the unusual procedural posture of this case as a consequence of the court's decision, the Commission allowed both applicants to file any amendments they believed necessary. Accordingly, we conclude that any amendment NOCGSA filed in response to the September 27 public notice was acceptable. In addition, as noted at note 5, *supra*, NOCGSA incorporated its September 3 application into its October 27 amendment, so its September 3 application is separately acceptable as part of the October 27 application.

24. Finally, because the Commission invited both parties to file whatever amendments they desired, the policy against "one-upsmanship" does not apply to this situation.[13]

B. La Star's Application and Amendment

1. The Fill - In Policy

25. NOCGSA argues, and La Star disagrees, that the Commission's fill-in policy should apply to La Star's application. It is clear that rule changes may be applied to pending applications in some situations. *See, e.g., Amendment of the Commission's Rules for Rural Radio Service, Order on Reconsideration of Second Report and Order*, 4 FCC Rcd 5377, 5382 note 17 (1989). Nevertheless, in the unique circumstances of this case, we believe it is more appropriate to designate these applications for hearing under the comparative criteria outlined in this designation order.

2. Wireline Eligibility

26. The Commission's rules require that applicants for Block B licenses have a wireline presence in the MSA for which they are applying. The 51% shareholder of La Star is SJI, which has a wireline presence in the New Orleans MSA. The 49% shareholder of La Star, Star (TDS) does own a number of wireline companies but does not have a presence in New Orleans. NOCGSA argues that Star (TDS) has *de facto* control over the partnership; that a controlling interest in the partnership does not have the requisite wireline presence in New Orleans and that, therefore, La Star is ineligible to apply for the Block B frequencies in New Orleans.

27. Supermajority voting provisions, such as some of those found in the Joint Venture agreement, have been approved by the Commission because they protect the rights of minority partners. *News International, supra*. Certain transactions pertinent to the existence of the partnership are an appropriate subject for supermajority treatment. However, the Joint Venture agreement's supermajority provisions may go beyond this simple purpose. Decisions regarding litigation, and most especially the appointment, compensation, and termination of a General Manager, are among the indicia of control by which the Commission has long determined which party has actual control of a licensee.

28. First, it appears that Star (TDS) has negative control over the selection or firing of the general manager, who according to the agreement is the party who will exercise the functions associated with construction and operation of the proposed cellular system. This negative control over the manager, combined with Star's (TDS') position as the financier of the cellular system, may give Star (TDS) *de facto* control over La Star.[14]

29. In addition, the Joint Venture agreement states that majority partner SJI "shall not be subject to any degree of financial exposure" until a construction permit has been issued to La Star. Section 10.2, Joint Venture Agreement. Nevertheless, there have been expenses associated with prosecuting La Star's application. It appears that Star (TDS) is assuming sole responsibility for these expenses, including reimbursement of La Star's counsel. Moreover, the policy decision to settle, pursue or dismiss La Star's instant application is one of the actions requiring consent of the minority partner, Star (TDS). Joint Venture Agreement, paragraph 4.3(xii). Again, it appears that Star (TDS) may have both negative control over litigation policy decisions and full financial control over litigation costs. Since control of La Star's application goes to the essence of control of the partnership, and since such policy decisions should remain under the control of the entity with wireline presence in the MSA, we will designate an issue for hearing on whether SJI maintains control over La Star. If not, La Star does not meet our wireline presence requirement in the New Orleans MSA and its application should be dismissed.

3. Financial Showing

30. NOCGSA includes an affidavit from BellSouth Mobility, Inc.'s General Manager - Network Business Operations, Mr. Ronald P. Michaelis, who charges that La Star's financial showing is inadequate because two items in La Star's estimates (construction of buildings and towers and first year interconnect charges) are underestimated by a total of $880,800. La Star counters with an affidavit from Mr. Richard W. Goehring, the Vice President of Engineering for United States Cellular Corporation (a wholly-owned subsidiary of TDS), who states that the costs proposed are within the range of estimates provided by providers of the construction services and equipment, and of other similar purchases made by USCC. Without a more extensive showing from NOCGSA that a financial issue should be designated, we find nothing unreasonable in La Star's amended financial proposal. Accordingly, we find that no substantial and material questions of fact have been raised regarding La Star's financial qualifications to build its proposed cellular system and we decline to designate a basic qualifying issue on this subject.

4. Comparative Criteria

31. The original comparative criteria which applied to the hearings for the top thirty cellular markets included proposed coverage of areas and population, maintenance, operations, financial viability, quality of service including roamer service, and coordination of demand with system design, engineering and expansion. *See, e.g., Advanced Mobile Phone Service, Inc.* (Chicago), 91 F.C.C.2d 512

(1982). In this case, however, we confront a new situation pertaining to comparison of an expansion application with an application for new service.

32. In these circumstances, because NOCGSA's application proposes expansion of an existing service area, there are additional considerations in connection with the traditional comparative factors between cellular applicants. Accordingly, we believe that, in addition to the criteria mentioned above, the Presiding Judge may, if sufficient probative evidence is produced, give NOCGSA a comparative credit for the fact that its proposed operation in St. Tammany Parish would be in conjunction with a previously authorized system in the neighboring city of New Orleans. In this regard, NOCGSA should be given the opportunity of presenting evidence that there is community of interest within the New Orleans MSA, and that its expansion application could better serve the public interest because of any such close connection between St. Tammany Parish and the city of New Orleans. Such evidence could include (but is not limited to) economic relationships between New Orleans and St. Tammany Parish, demand demographics, economies of scale resulting in efficiencies of operation, and evidence regarding reduced need for individual subscribers within the MSA to acquire roamer status when moving between St. Tammany Parish and New Orleans. In sum, any evidence regarding the community of interest between St. Tammany Parish and the city of New Orleans and related public interest benefits of the same entity operating in both areas should be taken into account by the Presiding Judge.[15]

IV. ORDERING CLAUSES

33. Wherefore, IT IS ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, that the applications of La Star Cellular Telephone Company, File No. 27161-CL-P-83, and New Orleans CGSA, Inc., File No. 29010-CL-P-83, ARE DESIGNATED FOR HEARING in a consolidated proceeding upon the following issues:

A. Threshold issues:[16]

1) to determine whether SJI maintains control over the decisions of La Star in connection with the prosecution of the captioned application;

2) to determine whether SJI maintains control over its proposed cellular system;

3) to determine whether Star is in *de facto* control of La Star;

4) to determine, in light of the evidence adduced under the foregoing issues, whether La Star is eligible to apply for Block B frequencies.

B. Comparative issues;

1) to determine whether NOCGSA's expansion applications will better serve the public interest because of any close connection between St. Tammany Parish and other parts of the New Orleans MSA;[17]

2) to determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer services;

3) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations, and facilities (including switching capabilities);[18]

4) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;[19] and

5) to determine whether NOCGSA should be given a comparative credit for operational efficiencies which may exist if there is a demonstrated community of interest between New Orleans and St. Tammany Parish;

6) to determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience, and necessity.

34. IT IS FURTHER ORDERED that the applicants SHALL FILE written notices of appearances under Section 22.916(b)(3) of the Commission's rules within 10 days after publication of this order in the Federal Register.

35. IT IS FURTHER ORDERED that the hearing SHALL BE HELD according to the procedures specified in Section 22.916 of the rules, except as otherwise noted here, at a time and place and before an administrative law judge to be specified in a later order.

36. IT IS FURTHER ORDERED that exceptions to the initial decision of the Administrative Law Judge under Section 1.276 of the Commission's rules SHALL BE TAKEN directly to the Commission.

37. IT IS FURTHER ORDERED, that any authorization granted as a result of this proceeding SHALL BE CONDITIONED upon obtaining the appropriate antenna structure clearances and upon frequency coordination with other cellular licensees.

38. The Secretary shall cause a summary of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The bulk of the New Orleans MSA land area lies in an L-shaped configuration. The city of New Orleans, which is the area of greatest population density, is in the joint of the "L." Lake Pontchartrain is located directly to the north of New Orleans, and St. Tammany Parish lies to the north of Lake Pontchartrain.

[2] Block B is the group of cellular frequencies licensed initially to a wireline carrier with presence in the MSA, *i.e.*, a public utility which provides landline telephone service within the MSA for which it is applying. Block A is the group of cellular frequencies reserved for initial licensing to a non-wireline carrier.

[3] The public notice stated in pertinent part:

The following application for frequency block B in the New Orleans, Louisiana MSA, is accepted for filing. The application is:

File No. 27161-CL-P83

La Star Cellular Telephone Company

This application is mutually exclusive with:

File No. 29010-CL-P-83

New Orleans CGSA, Inc.

Each applicant may file any amendments it deems appropriate in view of the likelihood that the applications will be designated for comparative hearing. . . .

The grants made to New Orleans CGSA, Inc., File Nos. 29010-CL-P-83 (on October 1, 1984) and 29181-CL-P-85 (on August 16, 1985, by order, Mimeo No. 6548) are hereby rescinded. New Orleans CGSA, Inc. may continue to operate these facilities under special temporary authority, effective upon release of this Notice, for a period of 180 days, renewable as required, pursuant to Section 309(f) of Title 47 U.S.C., and Section 22.25(b)(3) and 22.25(c) of the Commission's Rules. The reason for this decision is that New Orleans CGSA, Inc. has operated in the contested portion of the New Orleans MSA under color of license and in the public interest since 1985. The public would be harmed by any disruption or discontinuance of cellular service in the disputed area prior to a final decision in this proceeding.

[4] Although the application for interim operating authority was filed with the Secretary of the Commission prior to the issuance of the public notice, the Mobile Services Division staff did not receive the application until the day the public notice was issued.

[5] NOCGSA incorporated the September 3 amendment into its October 27 amendment by reference; the latter amendment was placed on public notice.

[6] The September 27 public notice permitted the parties to file only an opposition to petitions to deny the amendments and specifically stated that no further pleadings would be accepted. NOCGSA filed a "Motion for Leave to File Reply" to La Star's Opposition, and a Reply; La Star objected to the Motion and NOCGSA filed a further reply to the objection. As we indicated in the public notice, NOCGSA's additional pleadings will not be accepted, and we have not considered them in connection with this Order. Moreover, we note that we have examined the unauthorized pleadings, and find that, in any event, the issues raised are repetitive to the arguments raised by the parties and are fully addressed herein.

[7] Section 22.23(c)(3) states that major amendments are subject to Sections 22.27 and 22.31. In the Domestic Public Cellular Radio Telecommunications Service, an amendment which results in an increase in the CGSA is a major amendment. Section 22.27 provides that major amendments must be placed on public notice for 30 days, and Section 22.31(d) provides that an application filed more than sixty days after the first conflicting application will be returned without prejudice. Since a major amendment is ordinarily considered a new application, an applicant who files a major amendment after the cut-off date (*i.e.* sixty days after the earliest mutually exclusive application was filed) is cut-off from consideration with the other mutually exclusive applicants. *See* 47 C.F.R. Sec. 22.23(g).

[8] The Commission first announced the fill-in policy in the *Cellular Lottery Order*, 98 F.C.C.2d 175, 204-5 & n.81 (1984). In the *Amendment of the Commission's Rules for Rural Cellular Service, Second Report and Order*, 2 FCC Rcd. 2306 (1987) ("*Second Report and Order* "), the Commission codified the "fill-in" rule. Section 22.31(a)(1)(i) as amended by *Order on Reconsideration of Second Report and Order*, 4 FCC Rcd 5377 (1989), *appeal pending, Amery Telephone Company v. FCC*, No. 89-1524 (D.C. Cir., filed September 1, 1989), states:

> notwithstanding any other provision of this rule section and rule provision of this Part, applications by other than licensees or grantees for a Metropolitan Statistical Area (MSA) to serve unserved areas outside the presently authorized CGSA but within the MSA will not be accepted for five years from the date of the grant of the original construction authorization of each system in an MSA.

In this case, NOCGSA argues, since its captioned application was for the expansion of service within the New Orleans MSA, La Star should have been barred from filing a competing application pursuant to the fill-in policy.

[9] NOCGSA also cites *WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972), *West Michigan Telecasters, Inc. v. FCC*, 460 F.2d 883, 890 (D.C. Cir. 1972), and *Rio Grande Family Radio Fellowship*, 21 Rad. Reg. 2d (P&F) 602 (1972).

[10] At the time La Star filed its application in September 1983, Section 22.902(b) of the Commission's Rules stated in pertinent part that cellular "systems for [c]ommon carriers . . . engaged directly or indirectly, in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those general areas in which it provides such landline service." Thus, to be eligible for frequency Block B, La Star would have to be a wireline common carrier.

[11] Section 9.1 of the Joint Venture agreement provides:

> At any time after commencement of operation of the System, Telephone [SJI] has the option to require Star [TDS] to buy its Partnership Ownership interest and Star [TDS] has the option to require Telephone [SJI] to buy its Partnership Ownership interest, provided that such a transaction will not render the Company [La Star] ineligible to retain its FCC or any other required authorization for the System.

[12] The criteria for determining whether a given party has control of any licensed facilities in issue are as follows: 1. Does the party have unfettered use of all facilities and equipment? 2. Who controls daily operations? 3. Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? 4. Who is in charge of employment,

supervision and dismissal of personnel? 5. Who is in charge of the payment of financing obligations, including expenses arising out of operating? and 6. Who receives monies and profits derived from the operation of the facilities? Intermountain Microwave, 24 Rad. Reg. (P&F) 983, 984 (1963); Public Notice, Rpt. No. CL-87-1, Mimeo No. 009 (released October 2, 1986). In addition to the above-described indicia of control, the Commission examines the terms of any financial arrangement, since "one of the most powerful and effective methods of control of any business . . . is the control of its finances." Cornbelt Broadcasting Co., 14 Rad. Reg. 2d (P&F) 794, 795 (1968).

[13] In any event, we believe accepting NOCGSA's amendment is fully consistent with our policy against one-upsmanship. Given that La Star had an opportunity to review NOCGSA's application before filing, we think it was appropriate to permit both parties an opportunity to amend again on a single date after reviewing each other's application.

[14] We note the provision in the Joint Venture agreement (Section 4.5) which prohibits the 49% interest-holder, Star (wholly-owned by TDS through its affiliate, USCC) from entering into an agreement with La Star for construction, management, operation, or maintenance of the cellular system. However, this provision of the Joint Venture agreement does not appear to prohibit affiliates of TDS other than Star from entering into such contracts with La Star. Thus, there is still the possibility that TDS, the owner of Star, would, through another affiliate, construct, manage, operate, and/or maintain the La Star cellular system. These activities would place TDS in an even stronger position to exercise *de facto* control of La Star. *See* note 15, *supra*, for the indicia of *de facto* control by a minority interest holder.

[15] The considerations herein are analogous to those found in Section 22.33(c), which permits a licensee in the Public Land Mobile Service which is attempting to expand its existing service area to request a comparative hearing with a mutually exclusive applicant. Such a request must include a showing that existing subscribers demand expanded service in the contested area, *id.*, and the purpose of the rule is to give incumbent licensees an opportunity to show that expansion of their existing systems would better serve the public interest than a grant to a new applicant. *See Amendment of the Commission's Rules to Allow the Selection from Among Certain Applicants Using Random Selection or Lotteries Instead of Comparative Hearings*, 57 Rad. Reg. 2d (P&F) 427, 436-437 and n.15 (1984), *recon. denied*, 59 Rad. Reg. 2d (P&F) 748 (1985), *pet. for review denied sub nom. The National Latino Media Coalition v. FCC*, 846 F.2d 785 (D.C. Cir. 1987).

[16] La Star shall bear the burden of proceeding with the introduction of evidence and the burden of proof on these threshold issues. *See* 47 U.S.C. 3309(e). At the discretion of the Presiding Administrative Law Judge, the hearing may be bifurcated to consider the threshold issues in full before moving on to the comparative issues. Both the threshold issues and the comparative issues are to be tried pursuant to the expedited hearing provisions of Section 22.916(a)&(b) of the Rules. Those rules provide that "paper" hearings shall be conducted without oral testimony except at the discretion of the Presiding Judge, if he determines that the person requesting cross-examination has persuasively demonstrated that written evidence is ineffectual to develop proof.

[17] NOCGSA may not receive any comparative advantage for its financial investment or for its cellular operations within St. Tammany Parish. La Star Cellular Telephone Company, 4 FCC Rcd at 3783 n.18.

[18] *See* Cellular Communications Systems, 86 FCC 2d 469, 503 (1981), for a discussion of the relative importance of the evidence submitted under this issue.

[19] In making this comparison, preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency re-use the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-236

In re Applications of

Rucker Radio (hereafter "Rucker") File No. BPH-880407MJ

Sky Way Broadcasting, Ltd. (hereafter "Sky Way") File No. BPH-880407NA

For Construction Permit for a New FM Station in Fort Rucker, Alabama Channel 263A (100.5 MHz)[1]

HEARING DESIGNATION ORDER

Adopted: April 18, 1990; Released: May 31, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rucker*. Section 73.3526(d) of the Commission's rules requires that applicants for new broadcast facilities maintain their public inspection file at any place accessible to the public in the proposed community of license. However, Rucker points out that the entire Census Designated Place of Fort Rucker is occupied by a U.S. Army base. Therefore, it requests a waiver of Section 73.3526(d) of the Commission's rules in order to place its public inspection file in the City Hall of Daleville, a city adjacent to Fort Rucker. Based upon Rucker's representations, the public interest would be served by grant of the requested waiver.

3. *Sky Way*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Sky Way would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. An engineering review of both applications reveals that neither proposal would provide the required 70 dBu coverage over all of Fort Rucker, but would cover more than 80% of the residential area of the base. Accordingly, waiver of 47 C.F.R. § 73.315(a) is not required, and both waiver requests will be dismissed as moot. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from Chief, FM Branch, reference 8970-HVT).

5. Both applicants have petitioned for leave to amend their applications. The accompanying amendments were filed after June 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicant	Dates of Amendments
Rucker	July 18, 1988; November 9, 1988 (2); May 23, 1989; and January 16, 1990
Sky Way	January 30, 1990

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Sky Way would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Rucker shall submit an amendment changing frequency to Channel 263A as specified by the Commission's Order (DA 89-1617) in MM Docket 87-618 to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That a waiver of Section 73.3526(d) of the Commission's rules to locate the Rucker public inspection file at the City Hall of Daleville, Alabama, IS GRANTED.

11. IT IS FURTHER ORDERED, That the requests filed by both Rucker and Sky Way for waiver of Section 73.315(a) of the Commission's Rules ARE DISMISSED as moot.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Rucker and Sky Way ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section

1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The allocation for Fort Rucker, Alabama, was changed from Channel 226A to Channel 263A pursuant to the *Report and Order* in Docket 87-618, 5 FCC Rcd 37 (1990). Sky Way has amended to comply with the *Report and Order*. Rucker will be required to do so.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-252

In re Applications of

DIMITRI BANKSTON (Hereafter "Bankston")	File No. BPH-880407ME
AMERICAN CHRISTIAN RADIO SERVICE, INC. (hereafter "ACR")	File No. BPH-880407MF
WESTERN OHIO BROADCASTING CO. (hereafter "WOB")	File No. BPH-880407ML
OTTAWA BROADCAST, INC. (hereafter "OBI")	File No. BPH-880407MM

For Construction Permit for a
New FM Station on Channel 226A (93.1 MHz)
in Lima, Ohio

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 31, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. OBI has not completed Item 4 correctly. OBI's application gives a post office box number as the address for the following general partners of Ottawa Broadcast Partnership, an 80% non-voting stockholder of the subject application: Howard T. Banner, Dean Campbell, T.A. Ramsey, and J.E. Tillman. Accordingly, OBI must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *OBI.* Information before the Commission indicates that OBI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question OBI's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against OBI in this proceeding.

4. The applicants below have petitioned for leave to amend their applications on the dates shown below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Bankston	December 28, 1988
WOB	December 15, 1988; April 3, 1989
OBI	November 21, 1988; June 26, 1989; September 13, 1989

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of OBI.

2. To determine whether OBI's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether OBI possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That OBI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bankston, WOB, and OBI ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On May 8, 1989, Swan Creek Communications, by its attorney, requested voluntary dismissal of its application (BPH-880407MD). The request is in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated April 2, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-253

In re Applications of

FOG COMMUNICATIONS (hereafter "Fog") File No. BPH-880713MD

MELVIN N. PETERSON (hereafter "Peterson") File No. BPH-880714NF

LINDA ADAMS (hereafter "Adams") File No. BPH-880714NI

For Construction Permit for a
New FM Station on Channel 285A (104.9 MHz)
in South Oroville, California

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 31, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Fog, Peterson, and Adams would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Adams	March 9, 1990 (Engineering)

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Fog, Peterson, and Adams would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Adams IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FACSIMILE MARKETING, INC. File No. I-T-C-90-053

Application for authority to resell services of other common carriers to provide facsimile services from the United States to international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 23, 1990; Released: May 31, 1990

By the Chief, International Facilities Division:

1. On January 18, 1990, Facsimile Marketing, Inc. (Facsimile) filed the above-captioned application requesting authority, pursuant to Section 214 of the Communications Act of 1934, to resell the services of other common carriers to provide data communications from the United States to certain international points under the tariffs set forth in American Telephone and Telegraph Company's (AT&T) Tariff F.C.C. Nos. 1 and 2, MCI Communications Corporation's (MCI) Tariffs F.C.C. No. 1 and US Sprint Corporation's (US Sprint) Tariff F.C.C. No. 1. The application was placed on public notice on February 7, 1990. On April 25, 1990, Facsimile filed an amendment to their application updating the proposed countries it intended to serve. No comments were received.

2. Facsimile is a New York corporation. By the instant application, Facsimile proposes to offer international facsimile service between the U.S. and certain international points through the resale of the services of underlying common carriers authorized to provide IMTS. Facsimile states it will provide its service to customers by receiving a document and transmitting it to one of the international points of destination set forth in the underlying tariffs of AT&T, MCI or US Sprint. Facsimile states it will obtain the requisite capacity from carriers currently authorized to provide service between the United States and foreign points on a facilities basis. Facsimile states that it "will contract with and maintain operating agreements with persons or entities in the various foreign destinations who are legally qualified to execute transmission services for the lines of the local carrier or data service provider." We shall require Facsimile to obtain any necessary operating arrangements in each of the countries to which it provides service. Facsimile believes the data market between the United States and foreign points is growing and will continue to grow significantly and that additional market is therefore feasible and will stimulate new demand.

3. In authorizations of new entrants over the past decades, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international facsimile service by Facsimile from the United States to those international points named in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariffs F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-053 IS GRANTED, and Facsimile is authorized to provide international facsimile service by the resale of the International Message Telephone Service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariff F.C.C. No. 1 between the contiguous U.S. and those international points named in the underlying tarriffs.

6. IT IS FURTHER ORDERED that Facsimile shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1989).

9. IT IS FURTHER ORDERED that Facsimile is limited, under this order, to the provision of international facsimile services only. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, Teltec Saving Communications Co., File No. I-T-C-86-0629, Mimeo No. 3548, n. 2 (released April 4, 1986).

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-90-054

Application for authority to lease and operate facilities for direct service between the U.S. and South Korea

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 24, 1990; Released: May 31, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 5, 1990, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of direct service between the U.S. and South Korea. The application was placed on public notice on February 14, 1990. A Petition to Deny the application was filed by Pan American Satellite (PAS) on March 16, 1990. TRTI filed an Opposition to the Petition to Deny on March 29, 1990. PAS filed its Reply on April 10, 1990 and a Correction to the Reply on April 11, 1990.

2. PAS opposes a grant of TRTI's application at this time. According to PAS, France Telecom, which owns a 14.9% equity interest in TRT, has refused to consider any INTELSAT consultation for the PAS separate satellite system beyond the one-way video consultation (U.S. to France) that was concluded earlier. PAS states that France Telecom refuses to expand the present scope of U.S.-France service via separate systems despite clear customer interest in transmissions (both data and video) to and from France. Since the instant application proposes expansion of TRTI's operations within the U.S., PAS asks that the application not be granted until France demonstrates that its telecommunications markets are open to all U.S. companies, including U.S. separate satellite systems.

3. TRTI states that it is a non-dominant carrier and that its classification is not subject to change by virtue of any pending proceeding initiated by PAS.[1] TRTI states that it would be unfair to hold hostage to the adoption of French government policies satisfactory to PAS the unrelated application of predominantly U.S.-owned and U.S.-controlled TRTI.

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and South Korea by TRTI. A grant of the instant application will serve the public interest by making available the benefits of increased customer choice in the international telephone service market. Under the decision in *FTC Communications, Inc.*, 4 FCC Rcd 5633 (Com. Car. Bureau 1989) (FTC Ruling), TRT and its subsidiaries such as TRTI are non-dominant for the provision of service between the U.S. and Korea. That portion of the FTC Ruling was not altered by the decision disposing of PAS' petition for reconsideration of the FTC Ruling.[2] We disagree with PAS that TRTI's authority to provide such service should be withheld until the French government adopts policies more favorable to separate satellite systems. Although we are concerned with PAS' continued inability to gain further entry into the French market, PAS has not sufficiently demonstrated how denial or deferral of the instant application would serve the public interest.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-054 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite circuits between the Jamesburg, California earth station and INTELSAT's satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in South Korea, furnished by TRTI's correspondent in South Korea;

b. lease from AT&T and operate 12 voice-grade circuits in the Jamesburg, California earth station;

c. lease and operate connecting facilities between the Jamesburg, California earth station and TRTI's New York operating office; and

d. use said facilities to provide common carrier services, including switched message telephone services, between the U.S. and South Korea and beyond.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in South Korea, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

8. The Petition to Deny filed by PAS is hereby DENIED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In particular, TRTI cites PAS' petition for reconsideration of a Commission decision that found that TRTI's affiliate, FTCC, would continue to be subject to dominant carrier regulation with respect only to its services with France. Relying on its difficulties with France Telecom, PAS' petition for reconsideration, which was denied in pertinent part by the Chief, Common Carrier Bureau, on May 21, 1990, sought reclassification of FTCC as dominant for all international services.

[2] *See* Memorandum Opinion and Order, File No. I-S-P-89-003, DA-90-747, adopted May 21, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

NORTHWEST NETWORK COMMUNICATIONS, INC. File No. I-T-C-90-024

Application for Section 214 Authority to Resell Telecommunications Services of A Common Carrier between the United Staes and International Points *Nunc Pro Tunc*

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 24, 1990; Released: May 31, 1990

By the Chief, International Facilities Division:

1. On October 30, 1989 Northwest Network Communications, Inc., (Northwest) filed an application, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1989), for authority to operate as an international resale carrier *nunc pro tunc* to October 7, 1988.[1] Specifically, Northwest seeks authority to resell the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 to provide international switched voice services to the points in MCI's tariff.[2] The application, placed on Public Notice November 22, 1989, is unopposed.

2. Northwest, a Nevada corporation, is a wholly-owned subsidiary of Western Tele-Communications, Inc. (WTCI), a Delaware corporation. [3] On October 7, 1988, Northwest acquired the assets of Northwest Network, Inc., an unaffiliated California corporation. *See* Northwest Application at 2. Northwest Network, Inc. provided resale services between the U.S. Mainland and points within Numbering Plan Area 809, which includes international points. Prior to the October 30, 1989 filing of the instant application, neither Northwest Network, Inc. nor Northwest sought Section 214 authority to provide international services. Northwest states that this omission to file was inadvertent because Northwest Network, Inc. and Northwest believed that the locations within Numbering Plan Area 809 were considered domestic points and that the Commission had forborne from the regulation of all reseller services. Northwest further states that it is now aware of its obligation to seek Section 214 authority to provide international switched voice resale service to international points. *See* Northwest Application at 3.

3. Northwest states that significant demand exists for additional telecommunications service offerings to the international points served by MCI, whose services Northwest will resell. Northwest believes that demand for these types of services will grow as competitively priced services are made available. Moreover, Northwest states that grant of its instant application will allow Northwest to compete more effectively with other carriers by offering the calling capabilities of such carriers to its customers. *See* Northwest Application at 3-4.

DISCUSSION/ORDERING CLAUSES

4. Section 214 provides the Commission with the authority to require that carriers obtain a certificate that the "present or future public convenience and necessity require or will require the construction, or operation . . . ." of a new line or an extended line.[4] In this *Order*, we find that the present and future public convenience and necessity will be served by the grant of Northwest's application to provide international message telephone service between the United States and the countries set forth in MCI's Tariff F.C.C. No. 1 by reselling the international switched voice services of MCI, and that Northwest is qualified to provide IMTS service. In particular, we believe that the provision of IMTS service by Northwest on a resale basis will give U.S. consumers an additional choice in selecting a service provider. Moreover, the grant of Northwest's Section 214 application is fully consistent with our policy of promoting open entry in international telecommunications.

5. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by Northwest between the United States and those points set forth in MCI's Tariff F.C.C. No. 1.

6. Accordingly, IT IS ORDERED that the application of Northwest, File No. I-T-C-90-024, IS GRANTED to the extent discussed herein AND OTHERWISE DENIED and Northwest is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 between the U.S. and the points set forth in MCI's tariff.

7. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

8. IT IS FURTHER ORDERED that the applicant SHALL FILE tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this decision.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that this authorization is without commitment to any action the Commission might wish to take regarding violations of the Communications Act or the Commission's Rules.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] Also on October 30, 1989, Northwest petitioned the Commission for special temporary authority (STA) to resell the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 to provide international switched voice services between the U.S. Mainland and international points within Numbering Plan Area 809. Northwest advised that more than 1000 customers would be dislocated or disrupted absent grant of the STA. On December 1, 1989 we granted the STA, not to exceed May 28, 1990, for Northwest to provide international switched voice service by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1, without commitment to any action the Commission might take regarding violations of the Communications Act or the Commission's Rules. *See* Letter from Chief, International Facilities Division to Randall B. Lowe, Counsel for Northwest (December 1, 1989).

[2] *See* Letter from Michael R. Carper, Counsel for Northwest to Secretary, F.C.C. (filed November 27, 1989) (amending application to include all points in MCI's tariff).

[3] Northwest advises that it is neither directly or indirectly owned by a foreign telecommunications entity, nor are any officers or board members aliens or employees, agents or representatives of a foreign telecommunications entity.

[4] *See* 47 U.S.C. Section 214 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 23, 1990

COMMENTS INVITED ON ALABAMA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Alabama (Region 1).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 1 consists of the State of Alabama. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 90 - 280, Alabama - Region 1,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the Commission's Rules to Establish a New Emergency Medical Radio Service	RM-7336

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: May 23, 1990; Released: May 24, 1990

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On April 4, 1990, the Commission gave public notice of the Petition for Rule Making in the above captioned matter. Pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. § 1.405, deadlines for comments and reply comments were May 7, 1990 and May 22, 1990, respectively.

2. On May 16, 1990, the International Municipal Signal Association (IMSA) and the International Association of Fire Chiefs, Inc. (IAFC) filed a joint motion asking us to extend the reply comment deadline until May 31, 1990. IMSA and IAFC, the original proponents of this rule making, state that they require the additional time to receive input from their member organizations, and to prepare a comprehensive response to the large volume of comments received in this proceeding.

3. We recognize the importance of IMSA and IAFC's participation to the development of a complete record in this proceeding and, in light of the circumstances presented, find that good cause exists for the extension of time requested. To afford interested parties a full oppportunity to participate in this proceeding we will extend the due date of all reply comments to May 31, 1990.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that all interested parties will have until **May 31, 1990** to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave
Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-245

In re Applications of

WMRI, INC. (hereafter "WMRI")	File No. BPH-880722MH
GEM COMMUNICATIONS (hereafter "GEM")	File No. BPH-880725MI
ATLANTIC RESOURCES CORPORATION (hereafter "ARC")	File No. BPH-880725MJ

For Construction Permit for a
New FM Station on Channel 245A
in Bremen, IN

HEARING DESIGNATION ORDER

Adopted: April 30, 1990; Released: May 31, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *GEM*. GEM has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Section IV of FCC Form 301.[1] Accordingly, GEM will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and GEM have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by GEM would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. *ARC*. ARC petitioned for leave to amend its application on October 30, 1989. The accompanying amendment was filed after December 19, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by GEM would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, GEM shall submit an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by ARC IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] GEM indicates that its response to Section IV is contained in Exhibit 1 to FCC Form 301. However, it appears that Exhibit 1 was omitted from the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-250

In re Applications of

JIREH'S BROADCASTING, LIMITED PARTNERSHIP (hereafter "Jireh's")	File No. BPH-880420MG
MARANATHA BROADCASTING COMPANY, INC. (hereafter "Maranatha")	File No. BPH-880421MC
BRENDA FERGUSON AND MILES HAMILTON FERGUSON, JR. d/b/a FERGUSON RADIO PARTNERSHIP (hereafter "Ferguson")	File No. BPH-880421MT
HIGH COMMUNICATIONS PARTNERSHIP (hereafter "High")	File No. BPH-880421MV
SHIRLEE D. POPKIN (hereafter "Popkin")	File No. BPH-880421NI
JACKSONVILLE BROADCASTERS (hereafter "JB")	File No. BPH-880421MZ (DISMISSED HEREIN)

For Construction Permit for a
New FM Station on Channel 222C2 (92.3 MHz)
in Jacksonville, North Carolina

HEARING DESIGNATION ORDER

Adopted: May 1, 1990; Released: May 31, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* In response to Section III, FCC Form 301 (October 1986), JIREH's and Popkin both certified that they did not have sufficient net liquid assets on hand nor did they have sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. JIREH's and Popkin each qualified this response. JIREH's stated that it is in the process of documenting its financial qualifications. JIREH's further represented that its application would be amended at such time as its financial documentation was finalized in order to provide the appropriate financial certification. Popkin likewise stated that she would certify to her financial qualifications by amendment. No amendment concerning the financial certification was forthcoming from JIREH's or Popkin. Accordingly, JIREH's and Popkin will be required to demonstrate their financial qualifications at hearing pursuant to an appropriate financial issue, which will be specified below.

3. *JB.* JB has indicated in its application that its organizational structure is that of a general partnership. Moreover, in response to Section II, Item 4, FCC Form 301, JB has disclosed that one of its partners, Gail Buffong, is a Canadian citizen whose application for United States citizenship is pending. 47 U.S.C. § 310(b) prohibits ownership or control of FM radio licenses by foreign nationals. More specifically, pursuant to 47 U.S.C. § 310(b)(3), a license may not be granted to any corporation of which any officer or director is an alien. General partners, and all partners in non-limited partnerships are included in the proscriptions set forth in 47 U.S.C. § 310(b) because such partnership interests have indicia of control, namely the power to direct the management and operations of the partnership in a binding manner. These partnership interests therefore are equivalent to the position of officer or director of a corporation. The intent of Congress in adopting Section 310(b)(3) was to prohibit aliens from holding such controlling management positions in a licensee. Consequently, the Commission has construed the provisions of 47 U.S.C. § 310(b)(3) relating to officers and directors to include these partnership interests. *See Citizenship Requirements of a Licensee*, 103 FCC 2d 511, 520 n.43 (1985), *recon. granted in part on other grounds*, 1 FCC Rcd 12 (1986); *Addison Broadcasting Company*, 2 FCC Rcd 6357 (1987). *See also Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988).

4. It is well established that alien ownership is a basic qualifying issue. *See Bott Communications, Inc.* 1 FCC Rcd 347 (M.M. Bur. 1986). An application which violates the provisions of 47 U.S.C. § 310(b) with respect to ownership or control by foreign nationals is statutorily ungrantable. *Id.* Further, the Commission is without authority to exempt alien non-limited partners from clear statutory directives such as those set forth in 47 U.S.C. § 310(b). *See Citizenship Requirements of a Licensee*, 103 FCC 2d at 517-18, *on recon.*, 1 FCC Rcd at 14-15. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (1985), the Commission adopted strict rules governing the acceptance of amendments for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right at any time prior to the expiration of the 30 day period triggered by release of the Public Notice announcing that the application has been accepted for tender. 50 Fed. Reg. at 19941. *See also* 47 C.F.R. § 73.3522(a)(6). Thereafter, applications that are patently defective and thus unacceptable for filing are not entitled to comparative consideration with other applications which are not defective, but are substantially complete. 47 C.F.R. § 73.3566. Although JB's application indicates that Ms. Buffong's application for United States citizenship was pending at the time the subject application was filed, no amendment which represented that her alien status had

changed was filed within the period during which JB had the right to perfect its application in order to cure the underlying grantability defect. Accordingly, JB's application is patently defective and will be dismissed herein. *See Storer Broadcasting Co. v. U. S.*, 220 F.2d 204, 207 (D.C. Cir. 1955), *reversed on other grounds*, 351 U.S. 192 (1956). Further, the petition to deny JB's application filed by Ferguson will be granted to the extent indicated herein.

5. *Maranatha.* An engineering study has indicated that the Maranatha proposal would be short-spaced to the licensed facility for WKJA(FM), Belhaven, North Carolina. We note, however, that the *Report and Order* in MM Docket No. 85-339, 51 Fed. Reg. 19348 (May 29, 1986), substituted Channel 266C2 for WKJA(FM)'s current Channel 221A. Accordingly, if Maranatha's application is granted, that grant will be subject to the condition specified below.

6. *Other Matters.* In response to Section VI, FCC Form 301, the applicant below has indicated that she will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the 5-Point Model EEO Program. The EEO Program submitted by the listed applicant is incomplete or otherwise deficient in the manner described. Accordingly, the listed applicant will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
Popkin	Failed to identify specific publications which have significant circulation among or are of particular interest to, women and minority candidates and which will be used for employment advertisement

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Pursuant to 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Maranatha	December 8, 1988; May 18, 1989; September 19, 1989.
High	September 7, 1988

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Maranatha would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to JIREH's and Popkin, whether the applicants are financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Maranatha would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That for the reasons stated in paragraphs 3 and 4 hereinabove, the application filed by JB IS HEREBY DISMISSED and the petition to deny that application filed by Ferguson IS GRANTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in the event that the application of Maranatha is granted, the construction permit shall be conditioned as follows:

Program tests for Maranatha (BPH-880421MC) cannot commence until program tests for WKJA(FM), Belhaven, North Carolina, commence on Channel 266 and a license will not be granted for Maranatha (BPH-880421MC) on Channel 222C2 until a license is granted for WKJA(FM) on Channel 266.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Popkin shall submit Section VI information in accordance with the requirement of 47 C.F.R. §73.2080(c) to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Maranatha and High ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2), as amended, and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-282

In the Matter of

Amendment of Section 73.202(b), RM-7169
Table of Allotments,
FM Broadcast Stations.
(McComb, Mississippi and
Kentwood, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 3, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Dowdy Broadcasting Co., Inc. (petitioner), licensee of Station WXLT(FM), Channel 231C1, McComb, Mississippi, requesting the reallotment of Channel 231C1 to Kentwood, Louisiana, and modification of its license accordingly.[1]

2. Petitioner states that the allotment of Channel 231C1 to Kentwood (population 2,667) would provide the community with its first local service while McComb (population 12,331) would retain local service from FM Station WAKH and AM Stations WAPF, WAKK and WHNY. Further, petitioner states that no change in Station WXLT(FM)'s transmitter site or facilities is necessary since the transmitter is presently located approximately 12 miles southwest of Kentwood, providing the entire community with the required minimum signal strength of 70dBu.[2]

3. Channel 231C1 can be allotted to Kentwood, Louisiana, in compliance with the Commission's minimum distance separation requirements and can be used at Station WXLT(FM)'s present transmitter site. [3] Channel 231C1 at McComb is mutually exclusive with Channel 231C1 at Kentwood since the communities are separated by less than the 245 kilometers required for co-channel Class C1 allotments. Therefore, in accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of the channel at Kentwood.

4. We believe the public interest would be served by proposing the reallotment of Channel 231C1 from McComb, Mississippi, to Kentwood, Louisiana, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, as follows:

City	Channel No. Present	Proposed
McComb, Mississippi	231C1, 289C	289C
Kentwood, Louisiana	----	231C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 23, 1990,** and reply comments on or before **August 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W.
Suite 900
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is also the licensee of Station WAPF(AM), McComb, Mississippi.

[2] *See* 47 C.F.R. § 73.315(a).

[3] The coordinates for Channel 231C1 at Kentwood, Louisiana, are 30-51-18 and 90-39-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-283

In the Matter of

Amendment of Section 73.202(b),	RM-7222
Table of Allotments,	RM-7313
FM Broadcast Stations.	
(Southampton and Bridgehampton, New York)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 30, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making. Harrison Gray ("Gray") requests the allotment of Channel 225A to Southampton, New York, as the community's second local FM service. Garnet Tuttle ("Tuttle") requests the allotment of Channel 225A to Bridgehampton, New York, as its first local FM service. Gray and Tuttle each state their intentions to apply for the channel, if allotted to their respective communities. These petitions are mutually exclusive since Southampton and Bridgehampton are located only 9 kilometers apart, while the Commission's rules stipulate a minimum distance separation of 115 kilometers for co-channel Class A allotments.

2. Gray states that the Village of Southampton is located in Suffolk County. He states that Southampton is incorporated, with its own government and taxing authority, as well as police and fire services. Tuttle points out that Bridgehampton, although unincorporated, is a distinct community, with such attributes as a public library, municipal police and fire departments, and a local high school. According to the 1980 U.S. Census, Southampton village has a 1980 U.S. Census population of 4,000 persons, and Bridgehampton has a population of 1,941 persons.

3. Channel 225A can be allotted to Southampton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 225A can be allotted to Bridgehampton with a site restriction of 1.6 kilometers (1 mile) southwest to avoid a short-spacing to the construction permit of Station WBOS, Channel 225B, Brookline, Massachusetts.[1]

4. We believe the public interest would be served by affording each party an opportunity to demonstrate in comments why its proposal would better serve the public interest. Parties should be guided by the allotment priorities set forth in *Revision of FM Allotment Policies and Procedures*, 90 FCC 2d 88 (1982). Therefore, we propose the allotment of Channel 225A to either Southampton, New York, as its second local FM service, or to Bridgehampton, New York, as its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bridgehampton, New York	--	225A
	Or	
Southampton, New York	237A	225A, 237A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 23, 1990,** and reply comments on or before **August 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harrison Gray
33 Flying Point Road
Southampton, New York 11968
(Petitioner for Southampton)

Ms. Garnet Tuttle
533 Ashbury Drive
Fond du Lac, Wisconsin 54935
(Petitioner for Bridgehampton)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 225A at Southampton are North Latitude 40-53-18 and West Longitude 72-23-06. The coordinates for Channel 225A at Bridgehampton are North Latitude 40-55-51 and West Longitude 72-19-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-285

In the Matter of

Amendment of Section 73.202(b), RM-7235
Table of Allotments,
FM Broadcast Stations.
(Hannibal, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 30, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Seven Ranges Radio Company, Inc. (petitioner), requesting the allotment of Channel 258A to Hannibal, Ohio, as its first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Petitioner states that Hannibal, with a 1980 U.S. Census population of 1,318 persons, is an unincorporated community in Monroe County and "is organized as a township (Ohio) governed by an elected three-member board." Our review of petitioner's proposal shows that there is no U.S. Census listing for Hannibal. Rather, the 1980 U.S. Census lists Ohio Township with a population of 1,318 persons.[1] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Hannibal has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917, published May 3, 1983, and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. Channel 258A can be allotted to Hannibal in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence in the allotment is required since Hannibal is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We believe the public interest would be served by proposing the allotment of Channel 258A to Hannibal, Ohio, if it is ultimately found to be a community for allotment purposes, since it could provide a first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Hannibal, Ohio	--	258A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 23, 1990,** and reply comments on or before **August 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

D. Robert Eddy, President
Seven Ranges Radio Co., Inc.
Box 374, Greens Run Road
Saint Marys, West Virginia 26170
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Hannibal is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 650 persons. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for this allotment are North Latitude 39-40-00 and West Longitude 80-52-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-286

In the Matter of

Amendment of Section 73.202(b), RM-7285
Table of Allotments,
FM Broadcast Stations.
(Woodward, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 30, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Fuchs Communications, Inc. (petitioner) requesting the substitution of Channel 261C1 for Channel 228A at Woodward, Oklahoma, and the modification of its license for Station KWFX to specify the non-adjacent, higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 261C1 can be allotted to Woodward in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.2 kilometers (7.6 miles) southwest to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license to specify Channel 261C1. Section 1.420 of the Commission's Rules permits the modification of a station's license to a non-adjacent, higher powered channel if an additional equivalent class of channel is available for use by other parties which submit competing expressions of interest. To this end, petitioner states that Channel 292C1 can be allotted to Woodward if other parties express an interest in use of the Class C1 channel. Channel 292C1 can be allotted to Woodward without the imposition of a site restriction.[2]

3. We believe the public interest would be served by proposing the substitution of Channel 261C1 for Channel 228A at Woodward, Oklahoma, since it could enable Station KWFX to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Woodward, Oklahoma	221C3, 228A, 240A, 266C, 272A	221C3, 240A, 261C1, 266C, 272A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 23, 1990,** and reply comments on or before **August 7, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

A. R. Fuchs, Corporate Secretary
P.O. Box 1246
Woodward, Oklahoma 73802
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 36-20-40 and West Longitude 99-28-00.

[2] The coordinates for Channel 292C1 are North Latitude 36-26-12 and West Longitude 99-23-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-405

In the Matter of

Amendment of Section 73.202(b),	RM-6818
Table of Allotments,	
FM Broadcast Stations.	
(Elizabethton, Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6945 (1989), proposing the substitution of Channel 257C3 for Channel 257A at Elizabethton, Tennessee, and the modification of the license of Eaton P. Govan, III and Burton B. Cagle, Jr. (petitioner) for Station WUSJ-FM, to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 257C3, if allotted. No other comments were received.

2. As stated in the *Notice*, Channel 257C3 can be allotted to Elizabethton in compliance with the Commission's minimum distance separation requirements with a site restriction 14.7 kilometers (9.1 miles) northeast of the city to accommodate the petitioner's suggested transmitter site.[1]

3. We believe the public interest would be served by substituting Channel 257C3 for Channel 257A at Elizabethton, since it could provide the community with its first wide coverage area FM service. As proposed, we will also modify petitioner's license for Station WUSJ-FM to specify operation on Channel 257C3.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Elizabethton, Tennessee	257C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WUSJ-FM, IS MODIFIED, effective **July 16, 1990,** to specify operation on Channel 257C3 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are 36-26-57 and 82-06-31. Use of this site will avoid a short-spacing to Station WNOX(FM), Channel 257A, Jefferson City, Tennessee at coordinates 36-04-28 and 83-34-56. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-471

In the Matter of

Amendment of Section 73.202(b), RM-6697
Table of Allotments,
FM Broadcast Stations.
(Heidelberg, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1990; Released: June 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8006 (1989), proposing the substitution of FM Channel 257C2 for Channel 257A at Heidelberg, Mississippi, and modification of the license for Station WEEZ to specify the new channel. The *Notice* was issued in response to a petition filed by Pine Belt Broadcasting, Inc. (petitioner). The petitioner filed comments and reply comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 257C2 for Channel 257A at Heidelberg, providing the community with enhanced FM broadcast service. As indicated in the *Notice*, Channel 257C2 can be allotted to Heidelberg, Mississippi, consistent with the Commission's spacing requirements at petitioner's specified site.[1] Issuance of a construction permit for Channel 257C2 may be withheld, however, until Station WSLY, York, Alabama, is licensed on Channel 285C2 in accordance with MM Docket 88-318.[2] We have authorized a modification of petitioner's license for Station WEEZ, Heidelberg, to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 16, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Heidelberg, Mississippi	257C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WEEZ, Heidelberg, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 257C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested to the following:

William B. Grant
Grantell Broadcasting Company
Route 1, Box 400B
York, Alabama 36925

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 257C2 are 31-52-21 and 89-15-41.

[2] A *Report and Order* was adopted on August 24, 1989, in MM Docket 88-318, granting the substitution of Channel 285C2 for Channel 257A at York. This action became effective November 6, 1989. *See* 4 FCC Rcd 6923 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CARMODY'S RADIO PAGING SERVICE, INC. File No. 23283-CD-MP/L-85

For modification of license for Station KEK267 from frequency 43.56 MHz to 152.84 MHz in the Public Land Mobile Service at Fishkill, New York

and

HUDSON VALLEY MOBILE TELEPHONE, INC. File No. 21148-CD-P/ML-1-87

For an additional facility at Station KAA814 on frequency 152.84 MHz in the Public Land Mobile Service at Beacon, New York

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1990; Released: June 1, 1990

By the Chief, Mobile Services Division:

1. Hudson Valley Mobile Telephone, Inc. (Hudson Valley) filed a petition to dismiss the captioned application filed by Carmody's Radio Paging Service, Inc. (Carmody). Carmody has filed an opposition to which Hudson Valley has replied. In addition, Carmody amended its captioned application to change the location from Fishkill, New York to Newburgh, New York, and to request an additional channel on frequency 152.84 MHz on the captioned station instead of switching its authorized frequency from 43.56 MHz to 152.84 MHz, as originally requested. The parties have also filed supplemental pleadings.[1] Also pending is the captioned mutually exclusive application of Hudson Valley with Carmody's amended application for Newburgh, New York.

I. BACKGROUND AND CONTENTIONS

2. On January 25, 1983, Poughkeepsie Radio, Inc., predecessor-in-interest to Hudson Valley, a non-wireline carrier, filed an application (File No. 21642-CD-P-1-83) to construct a new one-way signaling facility on frequency 900 MHz at Poughkeepsie, New York.[2] The Hudson Valley application appeared on Public Notice as accepted for filing on February 9, 1983. [3] On November 14, 1984, Hudson Valley filed an amendment to the application to change the location from Poughkeepsie, New York to Ulster, New York and to change the frequency from 900 MHz to 152.84 MHz.[4]

3. On June 3, 1985 Carmody filed the captioned application to modify its existing authorization for PLMS Station KEK267 at Fishkill, New York by changing the authorized frequency from 43.56 MHz to 152.84 MHz. The Fishkill application was placed on public notice on August 7, 1985. Hudson Valley filed a petition to deny the captioned application, alleging that the Carmody application, which was mutually exclusive with its Ulster application, as amended, was cut-off from comparative consideration and should therefore be dismissed as defective. In opposition, Carmody asserted that Hudson Valley's amended application, having been returned as defective by the MSD, was no longer a pending application before the Commission and was, therefore, no longer entitled to cut-off protection.

4. On September 8, 1986, the Common Carrier Bureau (Bureau), on reconsideration, accepted for filing Hudson Valley's amended application *nunc pro tunc* as of November 14, 1984,[5] but denied Hudson Valley's request to retain its original filing date under Section 22.23(g)(2).[6]

5. On September 30, 1986, Carmody filed an amendment to the captioned application to change the location from Fishkill, New York to Newburgh, New York[7] and to request an additional channel for PLMS Station KEK267 on frequency 152.84 MHz instead of switching its authorized frequency from 43.56 MHz to 152.84 MHz, as originally requested. In addition, Carmody requested that its application be accorded 22.23(g)(2) treatment. Carmody's amended application was placed on public notice on October 15, 1986.[8]

6. Hudson Valley filed a petition to deny Carmody's September 30, 1986 amendment. In its petition, Hudson Valley reiterates its earlier argument that Carmody's application, as originally filed, to change frequencies from 43.56 MHz to 152.84 MHz was untimely filed with Hudson Valley's first-filed application for Ulster, New York and, therefore, should be dismissed. Furthermore, it argues that because Carmody's application was defective when originally filed, it cannot be cured by a subsequent amendment, citing *Arnold Anderson d / b / a Concho Communications*, Mimeo 2543 (Com. Car. Bur., released February 27, 1984) (*Concho*). Therefore, it argues that Carmody's amendment should be rejected and its application should be dismissed.

7. In opposition to Hudson Valley's petition, Carmody asserts that its September 30, 1986 amendment rendered its application to be newly-filed because its amendment neither created a frequency conflict with a mutually exclusive application nor prejudiced any party's filing rights. Therefore, Carmody argues that this case is distinguishable from *Concho*. Accordingly, Carmody requests that Hudson Valley's petition be dismissed.

8. On application for review of the Bureau's *Order*, the Commission, in *Leo V. Carmody*, 5 FCC Rcd 1149 (1990), granted Hudson Valley's application and found that it should have been given Section 22.23(g)(2) treatment. Accordingly, the 60 day cut-off period for filing mutually exclusive applications with Hudson Valley's first-filed application began on February 9, 1983, the public notice date for Hudson Valley's application as originally filed.

II. DISCUSSION

9. Carmody's original application was filed on June 3, 1985, after the cut-off date established by Public Notice No. 158 (February 9, 1983), which listed Hudson Valley's January 25, 1983 application as accepted for filing. Carmody's application was, therefore, untimely filed and not entitled to comparative consideration with Hudson Valley's application. While Carmody's application was technically defective, pursuant to Section 22.20(b)(7) of our Rules,[9] it was never dismissed. Therefore, in accordance to Section 22.23(a),[10] Carmody was entitled to amend its application as a matter of right.

10. We further find that Carmody's September 30, 1986 amendment, requesting an additional channel for Station KEK267 on frequency 152.84 MHz no longer creates harmful interference with Hudson Valley's Ulster proposed facilities and renders the application newly filed as of September 30, 1986 on frequency 152.84 MHz. Pursuant to Section 22.23 of the Commission's Rules, an application will be considered to be a newly filed application if it is amended by a major amendment. Under Section 22.23(c)(1), an amendment is major if it results in a substantial change in the engineering proposal, including but not limited to changes in, or an addition of a radio frequency. The addition of a channel on frequency 152.84 MHz, the change in location and the technical change do constitute such a substantial change.[11]

11. Having found that Carmody's September 30, 1986 amendment rendered its application to be newly filed, our records reveal that Carmody's Newburgh application is mutually exclusive with the captioned application filed by Hudson Valley on December 9, 1986 for frequency 152.84 MHz in Beacon, New York. Carmody's amended application for Newburgh, New York was placed on public notice on October 15, 1986. However, since Hudson Valley filed its captioned application on December 9, 1986, within 60 days of the public notice of the Newburgh, New York filing, it was timely filed.

12. Accordingly, IT IS ORDERED, that the petition to dismiss and/or deny filed by Hudson Valley Mobile Telephone, Inc. IS DENIED to the extent indicated above.

13. IT IS FURTHER ORDERED that a lottery between the captioned applications of Carmody's Radio Paging Service, Inc. and Hudson Valley Mobile Telephone, Inc. SHALL BE HELD at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] In accordance with Section 1.45(c) of the Commission's Rules, all unauthorized pleadings will not be considered.

[2] Applicants for the 900 MHz paging frequencies do not apply for a specific frequency. While they may state a preference for a frequency, they are not guaranteed that frequency. The Commission assigns a frequency to the applicant based on fixed mileage separation criteria.

[3] Public Notice No. 158 (February 9, 1983).

[4] By letter dated February 19, 1985, the Mobile Services Division (MSD) returned the Hudson Valley application as defective for not including a request for a waiver to use the 152.84 MHz frequency, a wireline frequency. The MSD also declined to grant Hudson Valley a Section 22.23 (g)(2) exemption, which would have permitted Hudson Valley's amended application to retain its original January 25, 1983 filing date.

[5] In so doing, the Bureau found that Hudson Valley's application did contain a waiver request to apply for the 152.84 MHz frequency.

[6] *Order on Reconsideration*, 61 Rad. Reg. 2d (P&F) 95 (Com. Car. Bur., 1986)(Order).

[7] Carmody's amended application also proposed to change the antenna system.

[8] In the Public Notice, the Commission denied Carmody's request for Section 22.23(g)(2) treatment on the grounds that Carmody's application was not entitled to comparative consideration with any other application. Carmody does not dispute this determination.

[9] Section 22.20(b)(7) provides that an application will be unacceptable for filing and will be returned to the applicant if the application is filed after the cut-off period.

[10] Section 22.23(a) states that "a pending application may be amended as a matter of right if the application has not been designated for hearing or placed on public notice for a random selection process."

[11] *Concho* is readily distinguishable from the case at hand. In *Concho*, the applicant sought to cure its application and retain its original filing date by submitting an amendment to its application after the cut-off period for a mutually exclusive application. Here, Carmody's originally filed appliction for Fishkill, New York was not yet dismissed and its amendment, filed on September 30, 1986, was not cut-off from comparative consideration by a mutually exclusive application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FTC COMMUNICATIONS, INC. File No. I-S-P-89-003

Petition for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: May 21, 1990; Released: June 1, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 14, 1989, Pan American Satellite (PAS) petitioned for reconsideration of a *Memorandum Opinion and Order* (*FTCC Ruling*) [1] that declared, pursuant to the Commission's international competitive carrier policies, that FTC Communications, Inc. (FTCC) would be classified as non-dominant in its provision of international common carrier services to all points except France. FTCC opposed the PAS petition, and PAS replied. For the reasons set forth below, we reaffirm the *FTCC Ruling*.

II. BACKGROUND

A. International Competitive Carrier

2. In 1986, in the *International Competitive Carrier* proceeding,[2] the Commission determined that it should make a distinction between dominant and non-dominant carriers in the international telecommunications market and streamline the regulation of non-dominant carriers in their provision of international common carrier services. [3] The Commission concluded that it would consider a firm to be dominant if it has market power, and listed factors it would consider in any determination of market power, such as market share, control of bottleneck facilities, rate of return, and actual or potential competition. The Commission also concluded that international communications properly are divided into international message telecommunications services (IMTS) and non-IMTS product markets.[4] Additionally, the Commission concluded that each country represents a separate geographic market and that generally no carrier would be considered dominant for non-IMTS and only AT&T and certain carriers providing international service for noncontiguous domestic points would be considered dominant for IMTS.

3. The Commission also concluded that foreign-owned carriers should be considered to have market power and therefore would be considered dominant for all services to all countries. Moreover, the Commission concluded that, for purposes of international competitive carrier policies, a foreign-owned carrier would be defined as a carrier that is over 15 percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors an employee, agent or representative of a foreign telecommunications entity sits. The Commission also included a provision for the grant of waivers of dominant status for good public policy reasons, however, such as where foreign investments are large but passive, but noted that it also might impose dominant carrier status where debt holdings or small equity investments are below the threshold ownership requirements, but are not passive.[5]

4. In December 1986, the Commission specifically determined that FTCC, as a result of the 19.9 percent foreign ownership of France Cables et Radio (FCR), must comply with the international competitive carrier rules applicable to dominant carriers in their provision of international common carrier services.[6] In early 1987, FTCC issued additional stock to its majority investor, National Gateway Telecom, Inc. (NGT), a wholly-owned subsidiary of Pacific Telecom, Inc. (PTI), both U.S. companies, which reduced the French government's ownership interest in FTCC to 14.9 percent. However, the French government, through FCR, retained its representative on FTCC's board of directors.

B. Previous FTCC Petitions for Non - Dominant Status

1. July 1987 Petition

5. On July 22, 1987, FTCC filed a petition seeking a waiver of the Commission's international competitive carrier policies. FTCC asserted that FCR's recent reduction in ownership interest to 14.9 percent should satisfy the Commission's concerns with respect to foreign ownership. At that time, TRT Telecommunications Corp. (TRT) opposed FTCC's petition.

6. On December 14, 1987, the Common Carrier Bureau (Bureau) denied FTCC's July 1987 waiver petition.[7] The Bureau concluded that FTCC had not demonstrated good public policy reasons for waiving the Commission's international competitive carrier policies declaring foreign-owned carriers to be dominant in their provision of international common carrier services.[8] The Bureau concluded that, contrary to FTCC's assertion, FTCC had not shown that the French government's investment in FTCC was passive,[9] because the French government, through its wholly-owned subsidiary, maintained an active role in FTCC's affairs through representation on the carrier's board of directors.[10] The Bureau also found that FTCC had not shown that the French government lacked the incentive and ability to grant less favorable treatment to the competitors of the carrier in which it held an active investment interest. In the absence of such showing, the Bureau concluded that FTCC had not demonstrated that the Commission's concerns about market distortions and lack of reciprocity that may occur due to foreign-owned carriers operating in concert with their parent organizations would or could not occur in that instance. Thus, the Bureau ordered that FTCC would continue to be classified as dominant in its provision of international services absent an express determination by the Commission that it is non-dominant.

2. Subsequent Petitions

7. On January 5, 1988, FTCC filed a petition asking the Commission to review the Bureau's decision denying its July 1987 waiver petition. On March 29, 1988, FTCC filed both a motion to hold its petition for review in abeyance and a second petition for waiver of the Commission's *International Competitive Carrier* policies. FTCC

proposed to increase FTCC's board of directors from five to seven members, limit FTCC's foreign investor to one director and hold these numbers static until FTCC gave the Commission at least 30 days' notice of any proposed change. TRT, PAS and MCI International, Inc. (MCII) opposed FTCC's second waiver petition. On January 5, 1989, FTCC asked the Commission to dismiss its petition for review and its second waiver petition. On January 19, 1989, the Common Carrier Bureau granted FTCC's request[11] for dismissal of its pleadings.[12]

C. The FTCC Ruling

8. On March 9, 1989, FTCC filed a petition seeking a declaratory ruling that, following a proposed change in ownership structure, FTCC would be classified as a non-dominant carrier under the Commission's *International Competitive Carrier* policies. FTCC explained that PTI had entered into an agreement with FCR to restructure FCR's interest in FTCC and certain affiliates of FTCC. Under the agreement, FCR no longer would hold a 14.9 percent interest in FTCC and no longer would be allowed to elect a representative to FTCC's board of directors. Rather, through its wholly-owned subsidiary FCR Holdings, Inc., FCR would hold a 14.9 percent interest in, and elect one of five directors to, a new holding company, ICC Communications Holdings, Inc. (ICH). The new holding company would wholly own FTCC, NGT and International Communications, Inc. (ICC), which was a wholly-owned subsidiary of PTI. ICC, in turn, wholly owned TRT Communications, Inc. (TRT). PTI would hold an 85.1 percent interest in ICH and thus in each of the holding company's wholly-owned subsidiaries, including FTCC. PTI also would elect all but one of the ICH directors, whose number could not decrease below five members, and there would be no foreign representative on the boards of FTCC, TRT or NGT.

9. In a *Memorandum Opinion and Order* (*FTCC Ruling*) released July 13, 1989, the Chief, Common Carrier Bureau granted FTCC's petition in part and denied it in part. Specifically, the *FTCC Ruling* concluded that FTCC would be classified as non-dominant in its provision of all international services to all points, except that it would continue to be classified as dominant in its provision of all common carrier services with France. The *FTCC Ruling* also conditioned the grant of non-dominant status to all points except France on the amendment of FTCC's existing Section 214 authorization for switched voice services to France to include certain standards applicable to the access filings of dominant carriers.[13] Finally, the *FTCC Ruling* concluded that TRT and NGT should not be treated as dominant carriers, either generally or for the French market.

10. The *FTCC Ruling* observed that, under the proposed ownership structure of FTCC, FCR's indirect interest in FTCC would be below the 15 percent threshold established in the *International Competitive Carrier* proceeding and that FCR would not have a representative on FTCC's board of directors. The *FTCC Ruling* therefore concluded that, under the definition provided for in the *International Competitive Carrier* proceeding, strictly speaking, FTCC should no longer be considered a foreign-owned carrier. The Bureau recognized, however, that the Commission had provided that it could determine whether a carrier should continue to be considered dominant on an ad hoc country-by-country basis. The Bureau noted that Pacific Telecom and FTCC specifically had provided for mechanisms that sought to attenuate the participation of FCR in FTCC's affairs.[14] In addition, there appeared to be nothing in FTCC's articles of incorporation or bylaws that would indicate an ability on the part of FCR to engage in cumulative voting to guarantee election of an FCR representative to one of the five FTCC board slots. Based on the record in the proceeding, the Bureau did not believe it would be appropriate to construe the FCR representation on the holding company to be the equivalent of foreign telecommunications entity representation on FTCC's board of directors. Therefore, given the evidence before it, the Bureau did not believe that the presence of an FCR representative director on the board of directors of the holding company, ICH, alone should result in FTCC's classification as a foreign-owned and, consequently, dominant carrier in its provision of international common carrier services.

11. The *FTCC Ruling* observed that the Commission had stated, however, that there are a variety of factors that should be used to determine whether a firm possesses market power and should be considered dominant. Factors that might be indicators of such power include market share, rate of return, control of facilities, and actual or potential competition. In this context, the *FTCC Ruling* noted that FTCC had very small shares of various international telecommunications services markets.[15] The *FTCC Ruling* also stated that the Commission had been encouraged by recent French efforts to permit greater competition in the international telecommunications services market through the provision of certain services over PAS to France and to move towards a more cost-based accounting rate structure with U.S. carriers.[16] The *FTCC Ruling* found that these French actions were positive initial steps toward attainment of the Commission's policy objectives of bringing the benefits of competition to the international telecommunications market and, given the proposed organizational structure for FTCC and its affiliates, they provided sound additional public policy reasons for reassessing the decision to hold FTCC dominant in its provision of international common carrier service to all points.

12. The Bureau expressed a continued concern, however, with the potential implications of FTCC's "exclusive gateway" arrangement with France Telecom and, as a result, concluded that it was appropriate to continue to classify FTCC as dominant in its provision of common carrier services to France. The Bureau observed that, under the FTCC-France Telecom arrangement, for example, a U.S. carrier seeking to acquire an operating agreement for the provision of switched voice service with France must route all traffic through FTCC until the carrier's traffic reaches a certain level. The Bureau noted that in similar circumstances -- that is, in the context of the US Sprint Section 214 application to initiate service to the Federal Republic of Germany (FRG) under a so-called "common gateway" arrangement with the Deutsche Bundespost[17] -- FTCC itself had stated that "[t]he operator of the gateway will control the bottleneck facility" and "would be able to discriminate in favor of its own IMTS services in ways that might be blatant or subtle."[18] As a result of FTCC's comments and the comments of other competing carriers, the Bureau had granted US Sprint's application subject to the condition that the rates and terms of US Sprint's provision of service to its competitors meet the standards applied to the access filings of dominant carriers.[19] Therefore, in light of the

FTCC-France Telecom "gateway" arrangement, past Commission practice, and FTCC's request for confidential treatment of its contract with France Telecom, the Bureau was unable to conclude that FTCC should be considered non-dominant for its provision of switched voice services between the U.S. and France. Moreover, in order to be consistent with the treatment of other carriers granted so-called "gateway" facilities, the *FTCC Ruling* conditioned grant of FTCC's petition on the amendment of FTCC's existing Section 214 grant[20] to include the conditions placed on US Sprint's authorization to the FRG.[21]

13. Finally, although the *FTCC Ruling* concluded that it was necessary to continue to classify FTCC as dominant in its provision of service to France, the Bureau concluded that, based on the facts currently before it, it did not have to treat TRT and NGT as dominant carriers, either generally or for the French market. The Bureau concluded that there was insufficient evidence on the record to require dominant status for these carriers as a result of FCR's indirect ownership interest or based on any other factor, such as operation of a bottleneck facility to France. The Bureau noted, however, that these carriers, like FTCC, would have the duty to file Section 43.51 reports setting forth their carrier-to-carrier agreements,[22] including their operating arrangements with FTCC or France Telecom, in a timely manner with the Commission.[23] The *FTCC Ruling* stated the Bureau's intent to monitor these filings and provide full opportunity for public comment, and observed that, should these filings demonstrate a need to reconsider the *FTCC Ruling*, the Bureau retained the authority to do so on its own motion or at the request of another party.[24]

III. SUMMARY OF PLEADINGS

A. PAS Petition for Reconsideration

14. On August 14, 1989, PAS filed a petition seeking reconsideration of the *FTCC Ruling*. PAS recounts that in 1988 it opposed on reciprocity grounds a number of FTCC Section 214 applications and that, as a result of expressions of U.S. government concern, the attitude of the French government seemed to change and in December 1988 France announced it would initiate an INTELSAT Article XIV(d) consultation, albeit on a limited basis. PAS adds that nevertheless PAS accepted the French agreement to consult as a good faith gesture and notified U.S. government agencies to that effect. PAS states that the FCC responded immediately and positively to the encouraging French developments. PAS contends that the circumstances on which the Bureau took those positive actions, however, including the grant to FTCC of non-dominant status for its international operations to all points except France, have changed. In particular, PAS asserts that France Telecom has been actively working to discourage potential users of PAS and otherwise has been doing all that it can, both officially and unofficially, to delay PAS' entry into France. PAS attaches to its petition for reconsideration an August 4, 1989 letter from counsel for PAS to the Chairman, FCC, which sets forth five examples of such alleged conduct. PAS also contends that the *FTCC Ruling* did not consider the reciprocity issues raised by PAS in its opposition to FTCC's request for declaratory ruling. PAS argues that dominant carrier classification of FTCC was proven to be a potent tool and that the Bureau now should consider imposing reciprocity sanctions on FTCC. In particular, PAS asks the Bureau to condition FTCC's international Section 214 authorizations for all countries to require reciprocal entry of additional U.S. carriers to the French market.

B. FTCC Opposition

15. FTCC opposes PAS' petition for reconsideration. FTCC responds that the *FTCC Ruling* in fact did address PAS' arguments concerning reciprocity. FTCC states that, just because the Bureau did not reach the result that PAS preferred does not mean that the Bureau did not consider PAS's arguments. FTCC also states that PAS has provided no details as to any specific actions on the part of France Telecom that would justify reconsideration of the *FTCC Ruling*. FTCC believes that the incidents recounted by PAS are described in only vague and general terms, without detail or documentary support, and admit to more than one explanation with respect to their significance and the motives imputed to France Telecom.[25] Finally, FTCC contends that PAS has failed to demonstrate that reimposition of dominant carrier status on FTCC would have any beneficial effect and that such status would contravene the Commission's international competitive carrier policies. In particular, FTCC asserts that grant of the PAS petition would elevate consideration of reciprocity based only upon vague, speculative and unsworn statements over concrete evidence of FTCC's lack of market power and non-dominant operations. FTCC believes this result would be inconsistent with the essential purposes underlying the Commission's *International Competitive Carrier* policies.

C. PAS Reply

16. PAS replies that there were numerous, concrete incidents of French attempts to undermine PAS during the April - July 1989 period, which were not clear to PAS in April 1989 when it commented on FTCC's request for declaratory ruling. Thus, PAS asserts that the Bureau has not considered PAS' concerns in the context of this proceeding. PAS also replies that it has provided ample, specific evidence to support its claims regarding France Telecom. PAS notes that four of the five items listed in its August 4, 1989 letter to the Chairman, FCC, related to specific incidents. PAS additionally appends to its reply several memoranda and letters involving two of these incidents, offers to provide materials on the remaining two incidents and encloses a telex to PAS from a Brightstar executive stating that the French PTT "showed tremendous hostility" to Brightstar's use of PAS for transmission into France. Finally, PAS replies that the Commission's reciprocity policy supports the relief PAS requests. PAS believes that it is influence of the nature France Telecom has -- a substantial ownership interest combined with even more significant voting authority -- that the Commission had in mind when it decided to apply dominant carrier regulation to foreign-owned carriers. PAS states that, instead of complaining about the "unfairness" of longstanding FCC policies, FTCC should try to influence France Telecom to open its telecommunications marketplace to companies seeking to do business in France.

IV. DISCUSSION

17. As the *FTCC Ruling* observed, FTCC does not fall strictly within the definition of a foreign-owned carrier. FCR's interest in FTCC is below the 15 percent threshold, and FCR does not have a representative on FTCC's board of directors. Moreover, PAS has not provided any evidence to demonstrate that the presence of an FCR representative director on the board of the holding company, ICH, alone should result in FTCC's classification as a foreign-owned and, consequently, dominant carrier in its provision of international common carrier services.

18. The *FTCC Ruling* also looked at the variety of other factors set forth in the Commission's *International Competitive Carrier* proceeding to determine whether FTCC possesses market power and should be considered dominant. PAS has not shown any changed circumstances in this regard. PAS has not demonstrated that FTCC has market power in any country other than France. FTCC's shares of various international telecommunications service markets remain small.[26] Moreover, while PAS may be correct that there has been little or no progress on issues of particular concern to PAS, the *FTCC Ruling* noted progress on other issues, such as lower accounting rates with U.S. carriers, which has continued.[27]

19. PAS has failed to explain why FTCC should be considered to possess market power with countries other than France or why our continued classification of FTCC as dominant to France does not provide us with an adequate opportunity for an ongoing review of any FTCC market power with respect to the French market. As PAS itself notes, our classification of FTCC as dominant has proved to be a "potent tool," and PAS fails to explain why this would not continue to be the case with regard to FTCC's relationship with France. Therefore, we reaffirm our conclusion that FTCC is dominant in its provision of common carrier services to France but nondominant in its provision of service to all other points. Moreover, we reaffirm all conditions we placed upon FTCC's provision of international service in the *FTCC Ruling*.[28] As a result, we retain the ability to use this authority to benefit competing U.S. firms as PAS has suggested we have done in the past. Finally, notwithstanding the decision reached here on PAS' petition, we reiterate our continued concern with PAS' inability to gain further entry to the French market.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the petition of PAS for reconsideration of the *FTCC Ruling* IS GRANTED to the extent discussed herein and otherwise DENIED.

21. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989).

[2] 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986).

[3] This streamlining includes a presumption that the tariffs of non-dominant carriers are lawful, a reduction in notice requirements before the tariffs can take effect, and removal of the requirement for economic and cost support data. Streamlined treatment also reduces facilities certification requirements for non-dominant carriers.

[4] The Commission found exceptions to this general market division for INTELSAT space segment, multi-purpose earth station services and television services, which it defined individually as separate product markets, and it concluded that Comsat was dominant in its provision of these three types of services.

[5] In addition, the Commission determined that it would impose certain filing requirements and would consider conditioning specific Section 214 certifications to carriers owned by foreign telecommunications entities on an ad hoc basis. 102 F.C.C. 2d at 842. The Commission clarified the definition of foreign telecommunications entities in *Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry*, CC Docket No. 86-494, FCC 88-71 (released March 25, 1988) at n.74. It stated therein that foreign telecommunications entities include telecommunications and telecommunications-related equipment manufacturers, equipment suppliers and service providers.

[6] *See, e.g.*, December 28, 1986 letter to Roger P. Newell, Counsel for FTCC, from the Chief, Common Carrier Bureau, in F.C.C. File No. ENF-87-4.

[7] FTC Communications, Inc., 2 FCC Rcd 7513 (1987).

[8] *Id.* at 7514.

[9] *See supra* para. 4.

[10] At that time, FCR continued to elect one of five FTCC directors.

[11] *See* January 19, 1989 letter from Chief, Common Carrier Bureau to Roger P. Newell, Counsel for FTCC, F.C.C. File Nos. I-S-P-87-005, I-S-P-88-005.

[12] The Bureau noted that, by virtue of its classification as a foreign-owned carrier under the Commission's decision in *International Competitive Carrier*, FTCC also is expressly subject to Section 43.81 of the Commission's Rules. *See Regulatory Policies and International Telecommunications, Order on Reconsideration*, CC Docket No. 86-494, FCC 88-405 (released January 4, 1989).

[13] FTCC Ruling at para. 22 and n.25.

[14] For example, the IHC shareholder agreement prohibits FCR from taking any action that would result in FTCC's classification as a dominant carrier. Moreover, the FCR representation on the board of the holding company is limited to one director on a board that cannot decrease below five members.

[15] The Bureau cited *Trends in the International Telecommunications Industry 1975 - 1987* (Industry Analysis Division, F.C.C., October 1988).

[16] The Bureau noted, specifically, that France Telecom had agreed to lower the accounting rate for sharing revenues and settling accounts for the provision of switched voice services between the United States and France from 1.4 (special drawing rights) (SDR) to 1.2 SDR. *See* January 11, 1989 letter from David J. Ritchie, General Attorney, AT&T to Donna Searcy, Secretary, FCC. The SDR is a monetary unit created by the International Monetary Fund (IMF). It has a floating value based on a weighted average of several currencies, including the U.S. dollar.

[17] As a result of this "gateway" arrangement, FTCC had petitioned for an order pursuant to Section 201 of the Communications Act of 1934, as amended, to compel US Sprint to provide interconnection to other carriers on just and reasonable terms and conditions. *US Sprint Communications Company*, 3 FCC Rcd 1484 (1988). In addition, TRT had opposed US Sprint's application alleging that the "common gateway" constituted a bottleneck facility that presented realistic long-term dangers of competitive restraint, and suggesting that these concerns might be mitigated by Commission regulation of US Sprint as a dominant carrier with respect to the U.S.-FRG market. Moreover, both TRT and FTCC had argued that the unique circumstances of the "common gateway" arrangements required the Commission to consider the terms and conditions under which the arrangements would be provided and that the Commission should designate the applications of competing carriers for hearing in order to determine whether carriers could engage in discrimination and other anticompetitive conduct, whether the proposed rates of each carrier were reasonable, which carrier could operate the "gateway" at lowest cost, and which carrier's operation of the "gateway" would best serve the public convenience and necessity.

[18] FTCC had continued by stating that:

> the discrimination could lie in the service area, such as giving better quality service to its own customers than to those of its competitors, or could be economic, by ensuring that its competitors' costs to reach West Germany are higher than its own. Without action by the Commission, there would be no way of ensuring that the non-operator competitors will be able to compete with the operator.

See FTCC Petition for Order Requiring Interconnection Pursuant to Section 201 of the Communications Act of 1934, p. 4.

[19] Specifically, the Bureau made clear that it would maintain full oversight of the terms and conditions of any tariff filing or contract setting forth US Sprint's rate to provide international haul service between the U.S. and the FRG. To this end, the Bureau required US Sprint to separate its rate for the provision of service between its switch in New York and the FRG from its postalized rate for end-to-end service. Moreover, the Bureau stated that it would evaluate the tariff or contract under standards similar to those applied to the access filings of dominant carriers because of their bottleneck capabilities. The Bureau noted that it expected to use existing principles, such as requiring fully distributed cost methodologies and access that is equal in price, terms and quality in all respects to that provided by US Sprint for its own services, to evaluate the reasonableness of any tariff schedule or contract. Finally, the Bureau conditioned the grant on US Sprint's following principles of nondiscrimination or equal treatment, including routing of a proportionate share of inbound traffic to the domestic network of its carrier competitors or, in the alternative, recognizing the principle of proportionate return traffic through the provision of a commensurate reduction in the price that the carrier customer must pay to route its FRG-bound switched voice traffic through US Sprint's switch, as well as certain other nondiscrimination principles, such as nondiscrimination in quality of service, cable/satellite ratio, order intervals and marketing efforts.

[20] *See* FTCC Communications Inc., I-T-C-87-075, 2 FCC Rcd 6114 (1987).

[21] These conditions as discussed *supra*, n. 19, were also included in the authorization of the Sprint initiation of service to the FRG as discussed in paragraph 22 and fn. 30 of the Sprint order, *supra* n. 17.

[22] *See also* Section 203 of the Communications Act, 47 U.S.C. § 203.

[23] The Bureau also noted that these carriers, like FTCC, continue to be subject to statutory nondiscrimination requirements, such as those provided for in Section 202 of the Communications Act. *See, e.g.*, 47 U.S.C. § 202.

[24] In this context, the Bureau also noted that FTCC, TRT and NGT have the obligation to bring to the Commission's attention any change to the organizational structure or terms of their arrangements to provide international common carrier services that would affect their status under the Commission's *International Competitive Carrier* policies.

[25] FTCC references an August 28, 1989 letter from France Telecom to the Chairman, FCC, in which France Telecom asserts that it is "ready, willing and able" to bring the agreement in principle between France Telecom and PAS "to fruition." *See* August 28, 1989 letter from William L. Fishman, Counsel to France Telecom, to Chairman Alfred Sikes.

[26] *See* Trends in the International Telecommunications Industry 1975-1988 (Industry Analysis Division, F.C.C., December 1989).

[27] France Telecom agreed to lower the switched voice accounting rate, effective January 1, 1989, from 1.4 SDR to 1.2 SDR per minute. Effective January 1, 1990, it again reduced the accounting rate for sent-paid full rate period switched voice traffic to 1.0 SDR. *See* File Nos. USP-89-(N)- 024 and USP-89-047. Similarly, the accounting rate for telex traffic was lowered, effective July 1, 1989, from 1.05 SDR to .95 SDR per minute, and the accounting rate for packet switched traffic was reduced, effective March 1990, from 3.32 SDR to 2.85 SDR per connect hour and kilosegment. *See* File Nos. USP-89-(W)-066 and USP-90-(W)-042.

[28] We clarify, however, that we will only grant FTCC Section 214 authority to "points beyond" with the exception of France. FTCC must continue to comply with all dominant carrier facilities licensing and tariffing requirements and should not seek authority to serve France through other points unless FTCC is prepared to comply with dominant carrier filing requirements for these other points as well.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FTC COMMUNICATIONS, INC.	File Nos. I-T-C-90-019 I-T-C-90-033

Application for authority to acquire and operate capacity in the PTAT-1 cable system for the provision of authorized common carrier service between the U.S. and the United Kingdom.

ORDER AND AUTHORIZATION

Adopted: May 21, 1990; Released: June 1, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-captioned applications, filed on October 31, and December 5, 1989, respectively, by FTC Communications, Inc. (FTCC), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom and beyond. The applications were placed on public notice on November 8 and December 13, 1989, respectively. Petitions to deny the applications were filed on December 11, 1989 and January 12, 1990, respectively, by Pan American Satellite (PAS). FTCC filed its oppositions on December 20, 1989 and January 23, 1990, respectively, and PAS filed its replies to the oppositions on February 2, 1990.

II. SUMMARY OF PLEADINGS

A. FTCC Application

2. FTCC is a non-dominant communications carrier authorized to provide common carrier services between the U.S. and the United Kingdom.[1] FTCC has been authorized to acquire and operate two DS-2 circuits in PTAT-1 for service to the United Kingdom.[2] FTCC is now requesting authority to acquire and operate two additional DS-2 circuits for service to the United Kingdom. [3] FTCC states that it will be using the requested capacity in PTAT-1 to supplement existing facilities to accommodate continued growth in its U.S.-United Kingdom services.

B. The PAS Petitions to Deny

3. PAS states that it has successfully secured INTELSAT Article XIV(d) consultations for all of its services with many countries. However, France has been a prominent exception. According to PAS, despite clear customer interest in both data and video transmission to and from France, France Telecom has consistently refused to consider any INTELSAT Article XIV(d) consultations for services beyond one-way video (U.S. to France). Thus, PAS argues, the French telecommunications market remains effectively closed to U.S. separate satellite systems.

4. PAS observes that France Telecom holds a 14.9 per cent interest in FTCC through various subsidiaries and holding companies. It notes that FTCC is not, at present, considered a dominant carrier to the United Kingdom. However, PAS also notes that the Common Carrier Bureau Order granting FTCC non-dominant status[4] is the subject of a petition for reconsideration. PAS asserts that FTCC should not be authorized to expand its operations in the U.S. during the pendency of the reconsideration proceeding. It states that the Commission has authority to evaluate market access issues in acting on Section 214 applications such as the instant FTCC applications. Citing *International Competitive Carrier*,[5] PAS asserts that the Commission has determined that it would consider, on a case-by-case basis, attaching conditions relating to reciprocal entry by additional U.S. carriers on Section 214 certificates granted to foreign-owned carriers. It further asserts that, until France demonstrates with concrete actions that its telecommunications markets are open to U.S. separate satellite systems, France Telecom's affiliate, FTCC, should not be permitted to expand its U.S. operations. Therefore, PAS requests that the subject FTCC applications be denied or, at a minimum, held pending final resolution of the reconsideration proceeding pertaining to FTCC's dominant carrier status.

C. The FTCC Oppositions

5. FTCC observes that the Commission has already decided that FTCC should be regulated as a non-dominant carrier for its services to points other than France. While PAS has filed a petition for reconsideration of that decision, FTCC notes that PAS did not request that the Commission stay the effectiveness of that decision and the Commission has not imposed such a stay. It argues that the Commission's determination that grant of the instant applications will serve the public interest can and should be made completely independent of consideration of the PAS petition for reconsideration of FTCC's non-dominant status. FTCC states that it has already been authorized to acquire circuits in the PTAT-1 cable system for use to the United Kingdom and contends that it has made the requisite showing that the additional PTAT-1 circuits requested by the instant applications are urgently needed.

6. FTCC asserts that it is a relatively small, truly non-dominant, carrier which must compete against much larger companies in the rapidly changing market for international services. It states that grant of the relief requested by PAS would preclude FTCC from competing effectively in this market until PAS' alleged grievances against France Telecom are resolved. FTCC contends that such a result would be unfair to its U.S. owners and to U.S. users of FTCC services.

D. The PAS Replies

7. PAS states that FTCC does not dispute the key factual predicate of PAS' petitions to deny: that France Telecom has denied U.S. separate satellite systems effective access to the French telecommunications market. PAS asserts that, in view of the uncontested facts in this proceeding, it is not possible under the Commission's

operative precedents for the Commission to consider the instant applications completely independent of PAS' claims regarding its inability to conduct its business in France. With respect to FTCC's assertion of unfairness, PAS contends that it is France Telecom's policy that is unfair. PAS asserts that U.S. users are equally, if not more, disadvantaged by France Telecom's refusal to permit PAS meaningful access to France.

III. DISCUSSION

8. It must be observed that all of the precedent cited by PAS relates to the Commission's consideration of reciprocity concerns with respect to dominant foreign-owned carriers. As PAS itself recognizes, FTCC has been reclassified as a non-dominant carrier for the provision of all services between the U.S. and all countries other than France. Since the circuits requested in the subject applications are for FTCC's provision of services between the U.S. and the United Kingdom, we shall consider FTCC as non-dominant for the purposes of this proceeding. Moreover, we will limit FTCC's authority to offer service "beyond" the United Kingdom to exclude authority to use these circuits to France.

9. As a result, we find that, with this limitation of FTCC's authority, FTCC's acquisition of the requested circuits will not constitute an expansion of the scope of FTCC's operating authority. FTCC has previously been authorized to provide service to the United Kingdom. It has previously been authorized to jointly operate circuits with both of the United Kingdom correspondents with which it proposes to operate the requested circuits.[6] Nothing in the applications suggests that the requested circuits will be used to provide new services. Rather, FTCC is requesting authority to acquire the subject circuits merely to satisfy increases in demand for its U.S.-United Kingdom services.[7] In view of the foregoing, and our decision to reaffirm the FTCC Ruling[8], we deny the PAS petitions to deny the instant applications. Notwithstanding these actions, we here reiterate our continued concern with PAS' inability to gain further entry to the French market.

10. The Commission stated in its Private Submarine Cable decision[9] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[10] In this context, we find that FTCC's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[11] Furthermore, we find that FTCC's application does not raise any economic impact issues.[12]

11. Upon consideration of the applications and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-019 and I-T-C-90-033 ARE GRANTED, and FTCC is authorized to:

a. acquire on an IRU basis, a one-half interest in two DS-2 circuits in the PTAT-1 cable;

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide FTCC's regularly authorized services between the U.S. and the United Kingdom and beyond with the exception of France.

13. IT IS FURTHER ORDERED that the Petitions to Deny filed by PAS are hereby DENIED.

14. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling*), because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier*). However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services.

[2] *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989).

[3] FTCC states that it will use one of the two circuits with its United Kingdom correspondent, British Telecom International, and the other with another United Kingdom correspondent, Mercury Communications, Ltd.

[4] *FTCCRuling*, *supra* note 1.

[5] *See supra* note 1, 102 FCC 2d at 843.

[6] *See* American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988) and CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989).

[7] Indeed, if FTCC were acquiring the subject circuits in any facility other than a private cable system or a private satellite system, it would not even be required to request authority to acquire them but, rather, could merely report their acquisition and use pursuant to Section 63.10 of the Commission's Rules. *See International Competitive Carrier*, 102 FCC 2d at 845.

[8] *See* Memorandum Opinion and Order, File No. I-S-P-89-003, DA-90-747, adopted May 21, 1990.

[9] Tel-Optik, Ltd., 100 FCC 2d 1033 (1985).

[10] This requirement was restated in *International Competitive Carrier*, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[11] The Commission places no special burdens on any carrier making an application for private cable capacity. *See* Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies*).

[12] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of ecnomic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

DS3 ICB Order Compliance Filings

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal No. 410
Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 344 and 345
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	Transmittal No. 288
Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35	Transmittal No. 555
GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 564 and 565
New England Telephone Company Revisions to Tariff F.C.C. No. 41	Transmittal No. 1032
New York Telephone Company Revisions to Tariff F.C.C. No. 40	Transmittal No. 1022
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1447
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. Nos. 68 and 69	Transmittal No. 1929
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 45 and 46

ORDER

Adopted: May 17, 1990; Released: May 18, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In December 1989, the Commission concluded an investigation of individual case basis (ICB) rates for DS3 and DS3-equivalent services of local exchange carriers.[1] In concluding this investigation, the Commission found that ICB rates for Special Access DS3 and DS3-equivalent services of the Bell Operating Companies (BOCs), GTE Telephone Operating Companies (GTOC), and other local exchange carriers (LECs) are unlawful because the ICB rates filed for DS3 services are unreasonably discriminatory. The Commission directed the LECs, with limited exceptions, to convert most existing ICB rates for DS3 and DS3-equivalent service to non-discriminatory, generally available rates. Additionally, in order to recognize the fact that some ICB customers have made substantial initial payments,[2] the Commission directed the LECs to tariff a credit mechanism that will reflect such prepayments, thus preventing customers in this position from being overcharged because of their conversion to general rates. Finally, the Commission stated that LECs would not be permitted to assess against their DS3 ICB customers termination liability charges or non-recurring charges upon conversion to general rates.

2. The instant transmittals were filed in response to the Commission's *ICB Order*. These compliance filings convert open-ended and month-to-month ICBs immediately to general rates and fixed-term ICBs to general rates one year from the effective date of the revisions. The transmittals are scheduled to become effective May 19, 1990.

3. In the instant transmittals, the LECs subject to the *ICB Order*, with the exception of New England Telephone (NET) and New York Telephone (NYT), require that fixed-term ICB customers convert to the LECs' general rate DS3 or DS3-equivalent service or be assessed charges under general tariff or ICB termination liability provisions. These conversions generally require the customer to commit to a minimum service period under the general rates. In some cases, the tariffs are ambiguous as to the minimum commitment period, and in other cases, the tariffs either state or imply that the customer must continue service for the remainder of the original ICB fixed-term.

4. BellSouth Telephone Companies (BellSouth), NET, NYT, and Southwestern Bell Telephone Company (SWB) have not included any credit eligibility provision or formula for calculating credits for initial payments. The remaining LECs generally limit the availability of the credit to customers who convert to the LECs' general DS3 service and who were explicitly offered a prepayment option as an alternative to the original bid for service. GTE Telephone Operating Companies (GTOC) further restrict credit to those customers who apply for it.

5. Ameritech retains all pre-March 28, 1988, ICBs which were tariffed or entered into prior to initiation of the ICB investigation. All other LECs amended all their fixed-term ICBs to terminate one year from the effective date of the instant transmittals, May 19, 1991.

6. American Telephone and Telegraph Company (AT&T) has filed a petition to reject or, in the alternative, suspend and investigate each of the above-captioned transmittals. Communications Transmission, Inc. (CTI), Metropolitan Fiber Systems, Inc. (MFS), StarTel Transmissions Co., Inc. (Startel), and Williams Telecommunications Group, Inc. (WTG), filed petitions to reject or suspend and investigate various transmittals. A listing of the parties who filed pleadings with respect to specific transmittals is included in the Appendix.

7. The petitions generally raise questions regarding the LECs' proposed imposition of termination liability charges to force customers to convert to the LECs' DS3 service and restrictions on customer eligibility for credits for prepayments for recurring charges.

8. In this Order, we grant the petitions to reject to the extent that we conclude that provisions which assess termination liability charges after ICBs expire at the end of the one-year transition period are prohibited by the *ICB Order*. We further conclude that restrictions on customer eligibility for prepayment credits are inconsistent with the *ICB Order* and we require carriers to amend such language in accordance with our determinations below. [3]

II. DISCUSSION

A. Termination Liability Charges

9. Petitioners generally argue that termination liability charges should be barred whether a LEC ICB customer chooses to retain LEC DS3 service or elects to order DS3 service from an alternate access provider at the time the ICB terminates after the one-year transition period. *E.g.*, AT&T Petition at 6 n.*. Petitioners also maintain that, as a matter of law, LECs cannot enforce termination liability charges since the termination charges are explicit terms of rates which the Commission has found unlawful. *E.g.*, CTI Petition (SWB Transmittal) at 6-7. These petitioners generally argue that the Commission's prohibition against the assessment of termination liability charges and non-recurring charges is intended to protect customers who committed to long service terms, and that allowing such charges would penalize customers who terminate service or opt to alter the term of service due to higher rates in the LECs' general DS3 tariffs.

10. The LECs, on the other hand, maintain that the *ICB Order* only prohibits the assessment of termination liability charges if customers convert their ICBs to LEC general DS3 offerings. *E.g.*, Ameritech No. 2 Opposition at 5-7. The LEC petitioners generally argue that if termination liabilities are eliminated altogether, other interstate special access customers will be forced to absorb any unrecovered costs, and that as long as the ICB contracts remain in effect, the terms and conditions of the agreements are lawful and enforceable. *E.g.*, Pacific Reply at 3.

11. We disagree with the LECs' interpretation of the *ICB Order*. That Order directed the LECs to "file tariff revisions . . . to amend the terms of all . . . ICB contracts for all DS3 and DS3-equivalent service to terminate one year from the effective date of the tariff revisions." *ICB Order*, 4 FCC Rcd at 8644. This language clearly requires the LECs to terminate the ICB contracts. Because it is the LECs who terminate the ICBs, and not the customer, we conclude that the LECs cannot impose termination liability charges on customers who elect to take DS3 service from a non-LEC provider when the ICB expires at the end of the one-year transition period. We emphasize that at the time the ICBs expire, they will cease to be effective in their entirety, including their termination liability provisions, and customers will be free to discontinue DS3 service altogether, elect to take DS3 service from an alternative provider, or from the LEC under its general DS3 rates.

12. Only GTOC included specific tariff language that requires customers to convert to its general DS3 rates or be assessed a termination liability charge. *See, e.g.*, GTOC Tariff F.C.C. No. 1, Transmittal No. 565, 16th Revised Page 222.2.11. Accordingly, for the foregoing reasons, we will reject the GTOC's tariff revisions to the extent that the GTOC tariff assesses termination liability charges after the ICBs expire at the end of the one-year transition period on the ground that these revisions violate the *ICB Order*. We note that other carriers include ambiguous tariff language which could be interpreted such that customers would be assessed termination liability charges should they discontinue service at the end of the one-year transition period rather than convert to the LECs' general DS3 rates. However, any attempt by a carrier to impose such charges on a customer would, in our view, contravene the *ICB Order*.

13. We conclude, however, that the *ICB Order* does not preclude LECs from assessing termination charges under existing ICBs if a customer chooses to terminate the service during the transition year. Had the Commission intended the existing ICBs (and their provisions regarding termination liabilities) to be totally void for all purposes, the Commission would not have specifically provided for a one-year transition period prior to the termination of the existing ICBs.

B. Credit Restrictions

14. Petitioners argue that the tariff revisions unreasonably restrict customer eligibility for credit for initial payments. LECs limit the availability of such credit by requiring that customers must have been explicitly offered a prepayment option for recurring rates as an alternative to the original service bid, and that customers must convert to the LECs' averaged-rate DS3 rate. Due to these restrictions, petitioners assert, many customers who took prepayment options will not receive credit for those payments. *See, e.g.*, AT&T Petition at 7-8. Moreover, AT&T notes that BellSouth, NET, NYT, and SWB failed to file any credit provisions, thereby preventing AT&T from recovering substantial amounts which it has expended under the ICB tariffs. *Id.* at 7 n.*. AT&T avers that credit should be accorded to any customer who effectively reduced recurring charges, as determined by the difference between the non-recurring charges paid under ICB rates and the general tariff non-recurring charges (NRCs). *Id.* at 9.

15. BellSouth, NET, and NYT claim they did not offer any prepayment options to reduce recurring charges. SWB asserts that none of its customers elected to take the prepayment option for its DS3 service. Consequently, these carriers contend they need not offer credit for any such payments. The LECs generally maintain that the *ICB Order* does not require the LECs to provide a credit differential to reflect differences between ICB rates and general tariff rates. *See, e.g.*, GTOC Reply at 5. The LECs contend that restrictions on credit eligibility are not un-

reasonable because they only limit credit to those customers who actually chose a prepayment option to reduce their recurring rates. *Id.*

16. We conclude that the LEC restrictions on customer eligibility for prepayment credits are inconsistent with the *ICB Order*. GTOC's restrictions, for example, require customers to convert to GTOC's general rates, request credit no later than 30 days after conversion to general rates, and demonstrate that the customer was offered a prepayment option as an explicit alternative to the original service bid. *See* GTOC Transmittal No. 564, filed Jan. 18, 1990, Tariff F.C.C. No. 1, Section 5.6.11(I). The *ICB Order* required the LECs to design a credit mechanism that will ensure that customers receive compensation for amounts they have already paid for their service. The restrictions in these tariffs would withhold from customers the credits to which they are entitled. Accordingly, we reject all proposed tariff language, as described above, which restricts customer eligibility for credit for initial payments.

17. Whether a LEC described an initial payment as a prepayment option, a non-recurring charge, or some other charge is not relevant. A prepayment for which credit is due means any ICB initial payment that exceeds the general tariff initial payment less the benefit received from ICB recurring charges that are lower than general tariff recurring charges. Thus, if a customer paid an ICB non-recurring charge that is greater than the general rate non-recurring charge, the customer should receive a credit (except to the extent that it is offset by the benefit the customer received by paying a lower ICB recurring charge). Conversely, if the ICB non-recurring charge is less than the general NRC rate, then we presume this payment constitutes the entire NRC and the customer made no prepayment for recurring charges. Therefore, we will require all LECs, including SNET and those who claim they did not offer prepayment options as NRCs.[4] to file new or revised tariff language, not later than 15 days from the release of this Order, to provide customers credit for the appropriate amount. To the extent a customer received a reduced recurring rate under the ICB, the credit may be reduced by the present value of that reduction. In revising or adding credit language, the LECs should specify in their tariffs the formula by which credits will be calculated.

C. Pre - March 28, 1988 ICBs

18. MFS and WTG assert that the *ICB Order* explicitly determined that "grandfathered" ICB rates were unreasonably discriminatory and, as such, required these rates, with a few exceptions, to be terminated. MFS Petition (Ameritech Transmittal) at 2; WTG-Ameritech Petition at 2. Petitioners argue that the Commission did not make an exception for ICB arrangements entered into or tariffed prior to March 28, 1988, noting that no LEC other than Ameritech interpreted the *ICB Order* as exempting pre-investigation ICBs. Therefore, petitioners conclude, Ameritech's attempt to maintain these ICBs should be rejected.

19. In reply, Ameritech claims that a "direct" reading of the ordering clauses indicates that the *ICB Order* found only that the ICB rates designated for investigation were unreasonably discriminatory. Since Ameritech's pre-March 28, 1988, ICB arrangements were not specifically placed under investigation, Ameritech argues that these rates are not unlawful and that its treatment of these ICBs is consistent with the *ICB Order*. Ameritech Opposition No. 2 at 4-5.

20. We find Ameritech's interpretation of the scope of the *ICB Order* unpersuasive. The *ICB Order* found all DS3 and DS3-equivalent ICB rates unlawful, with certain specific exceptions. The Commission specifically found that Ameritech possessed the requisite experience to develop general rates for its DS3 and DS3-equivalent services. Further, there is no indication that any of Ameritech's pre-March 28, 1988, ICB arrangements fall within the exceptions. Thus, we conclude that Ameritech must amend its pre-March 28, 1988, ICB arrangements to expire concurrently with all of Ameritech's other DS3 and DS3-equivalent ICBs not later than 15 days from the release of this Order.

III. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate the captioned transmittals filed by American Telephone and Telegraph Company, Communications Transmission, Inc., Metropolitan Fiber Systems, Inc., Startel Transmission Co., Inc., and Williams Telecommunications Group, Inc., ARE GRANTED to the extent indicated herein and ARE OTHERWISE DENIED.

22. IT IS FURTHER ORDERED that the tariff revisions filed by GTE Telephone Operating Companies ARE REJECTED to the extent that the revisions would assess termination liability charges in individual case basis tariffs after the individual case basis tariff arrangements expire at the end of the one-year transition period established by the Commission in the *ICB Order*.

23. IT IS FURTHER ORDERED that tariff revisions filed by Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Cincinnati Bell Telephone Company, GTE Telephone Operating Companies, Pacific Bell, and US West Communications restricting customer eligibility for credits for initial payments ARE REJECTED.

24. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL AMEND all of its pre-March 28, 1988, individual case basis tariff arrangements to terminate one year from the effective date of Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 410.

25. IT IS FURTHER ORDERED that petitions to reject or suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1438, filed by MCI Telecommunications Corporation and Williams Telecommunications Group, Inc. ARE DISMISSED AS MOOT.

26. IT IS FURTHER ORDERED that all local exchange carriers that filed transmittals in response to the *ICB Order* SHALL FILE revisions complying with the requirements of this Order, to be effective on 35 days' notice, not later than 15 days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order), recon. pending.*

[2] Certain customers paid large initial non-recurring charges that actually included payment of some recurring charges. By including some recurring charges in the prepayment, the customer reduces or "buys down" its monthly recurring charge.

[3] Pacific initially filed general DS3 rates in Transmittal 1438. That transmittal was protested by MCI Telecommunications Corporation and Williams Telecommunications Group, Inc., but became effective March 1, 1990. The subsequent transmittal makes the questions raised in the MCI and WTG petitions moot. Therefore, we dismiss the petitions against Pacific Transmittal 1438.

[4] No petitions were filed against Southern New England Telephone (SNET) Tr. No. 500. However, SNET proposes credits for initial payments only if customers convert to service under its general DS3 rates.

Appendix

Listing of Transmittals and Pleadings

1. Ameritech Operating Companies, Tariff F.C.C. No. 2, Tr. No. 410

   American Telephone and Telegraph Company (AT&T)
   Communications Transmission, Inc. (CTI)
   Metropolitan Fiber Systems, Inc. (MFS)
   Williams Telecommunications Group, Inc. (WTG)
   Ameritech Opposition to MFS (Opposition No.1)
   Ameritech Opposition to AT&T, CTI and WTG (Opposition No. 2)

2. Bell Atlantic Telephone Companies Tariff F.C.C. No. 1,
   Tr. Nos. 344 and 345

   AT&T
   MFS
   WTG
   Bell Atlantic Opposition to MFS motion for filing extension
   Bell Atlantic Reply to MFS
   Bell Atlantic Reply to AT&T and WTG

3. BellSouth Telephone Companies Tariff F.C.C. No. 4, Tr. No. 288

   AT&T
   MFS
   BellSouth Reply

4. Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Tr. No. 555

   AT&T

5. GTE Telephone Operating Companies Tariff F.C.C. No. 1, Tr. No. 565

   AT&T
   GTOC Reply

6. New England Telephone Company Tariff F.C.C. No. 41, Tr. No. 1032

   AT&T
   NYNEX Reply

7. New York Telephone Company Tariff F.C.C. No. 40, Tr. No. 1022

   AT&T
   NYNEX Reply

8. Pacific Bell Tariff F.C.C. No. 128, Tr. No. 1447

AT&T
MFS
WTG
Pacific Reply

9. Southwestern Bell Telephone Company Tariff F.C.C. Nos. 68 and 69, Tr. No. 1929

AT&T
CTI
MFS
Star Tel Transmission Co., Inc. (Star Tel)
SWB Opposition to MFS motion for filing extension
SWB Reply to MFS
SWB Reply to AT&T and CTI

10. US West Communications Tariff F.C.C. No. 1, Tr. Nos. 45 and 46

AT&T to Tr. No. 45
MFS to Tr. Nos. 45 and 46
US West Reply to MFS
US West Reply to MFS and AT&T

NOTE: Abbreviations used in this Appendix are used throughout the Order.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990 — 261-072/20018